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Stephen F. Smith

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# OVERCOMING OVERCRIMINALIZATION

STEPHEN F. SMITH\*

*The literature treats overcriminalization (and, at the federal level, the federalization of crime) as a quantitative problem. Legislatures, on this view, have simply enacted too many crimes, and those crimes are far too broad in scope. This Article uses federal criminal law as a basis for challenging this way of conceptualizing the overcriminalization problem. The real problem with overcriminalization is qualitative, not quantitative: federal crimes are poorly defined, and courts all too often expansively construe poorly defined crimes. Courts thus are not passive victims in the vicious cycle of overcriminalization. Rather, by repeatedly interpreting criminal statutes broadly, courts have taken the features of federal criminal law that critics of federalization find objectionable—its enormous scope and its severity—and made them considerably worse. By changing how they interpret criminal statutes, the federal courts can help overcome overcriminalization even if Congress continues to be unrestrained in its use of the criminal sanction.*

## I. INTRODUCTION

Few issues have received more sustained attention from criminal law scholars over the last half-century than overcriminalization. It is fair to say the judgment of the scholarly community has been overwhelmingly negative. From all across the political spectrum, there is wide consensus that overcriminalization is a serious problem.<sup>1</sup> Indeed, a recent book-length

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\* Professor of Law, University of Notre Dame. I am grateful to Albert Alschuler, Darryl Brown, John Jeffries, and Daniel Richman for a variety of helpful exchanges over the years about overcriminalization and the serious problems it has created. Like everyone else in the field, I owe a large debt of gratitude to my former teacher, the late Professor William J. Stuntz, who left behind an enduring body of work (including his posthumously published masterwork, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011)) showing that American criminal law and procedure is heavy on law but often surprisingly light on justice. Professor Stuntz was taken from us far too soon, and we are all the poorer for it. *Requiescat in Pace*.

<sup>1</sup> As one leading scholar has explained, overcriminalization “has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and

treatment of the subject describes overcriminalization as “*the most pressing problem with the criminal law today.*”<sup>2</sup>

As the term implies, “overcriminalization” posits that there are too many criminal laws on the books today. It is, of course, difficult to make such claims without a normative baseline—an idea of what constitutes the “right” number of criminal laws—and such a baseline is elusive at best. Still, history and crime rates provide relevant benchmarks, and they suggest that the criminal sanction is being seriously overused, particularly at the federal level, where overcriminalization has resulted in nothing less than the federalization of crime.

Federal criminal law has been growing at a breakneck pace for generations. According to a 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970.<sup>3</sup> The relentless pace at which new federal crimes are passed has continued despite significant recent declines in crime rates. On average, Congress created fifty-seven new crimes every year between 2000 and 2007, roughly the same rate of criminalization from the two prior decades, resulting today in some 4,500 federal laws that carry criminal penalties.<sup>4</sup> Thus, whether crime rates are rising or falling, the one constant—as predictable as death and taxes—is that scores of new federal criminal statutes are being enacted.

In addition to the ever-expanding number of criminal statutes, standard critiques of overcriminalization also bemoan the broad scope of modern criminal codes. Contemporary criminal codes reach conduct that, in previous generations, would not have been subject to punishment. The classic example is so-called regulatory offenses. These offenses punish conduct that is *mala prohibita*, or wrongful only because it is illegal, and may allow punishment where “consciousness of wrongdoing be totally wanting.”<sup>5</sup> With the proliferation of regulatory offenses, infractions that in

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ought to be narrowed.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

<sup>2</sup> DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2007) (emphasis added).

<sup>3</sup> AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998); see also John S. Baker, Jr., *Corporations: Measuring the Explosive Growth of Federal Crime Legislation*, ENGAGE: J. FEDERALIST SOC’Y’S PRAC. GROUPS, Oct. 2004, at 23, 27, available at [http://www.fed-soc.org/doclib/20080313\\_CorpsBaker.pdf](http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf). (finding more than a one-third increase in the number of federal crimes since the early 1980s).

<sup>4</sup> See JOHN S. BAKER, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 26: REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008).

<sup>5</sup> *United States v. Dotterweich*, 320 U.S. 277, 284 (1943). As *Dotterweich* explained, regulatory offenses employ criminal penalties as a form of regulation to promote the effectiveness of health, safety, and welfare rules otherwise enforced through noncriminal

prior generations might not even have resulted in civil fines or tort liability are now subject to the punishment and stigma of the criminal law.<sup>6</sup>

This is the conventional account of overcriminalization. It reflects the deeply held beliefs of many scholars and participants in the public policy arena. Unfortunately, as true as it is, it is remarkably incomplete—so incomplete, in fact, as to be potentially misleading.

As I hope to demonstrate in this Article, the usual overcriminalization story has two key shortcomings. *First*, it obscures an important causal factor in the rise of overcriminalization—which, properly understood, is not a function of legislative choice alone. The overcriminalization problem is not simply that legislatures have enacted too many criminal laws and cast those laws in terms that are too expansive in reach. Courts bear a large share of the blame for overcriminalization, given their penchant to construe ambiguous criminal statutes broadly in a misguided quest to ensure that morally blameworthy offenders will not escape conviction. *Second*, standard critiques of the number and scope of criminal laws give insufficient attention to the serious crime-definition and sentencing problems that make a broad and deep criminal code so troubling in practice. These problems, at their root, are not that they expose too much conduct to punishment, but rather that they reach conduct that either does not deserve punishment or that does not deserve the amount of punishment provided for in particular contexts.

Both of these shortcomings in conventional understandings of overcriminalization emanate from a common mistake—namely, the tendency to think about overcriminalization primarily in *quantitative* terms. That is to say, overcriminalization is typically framed as an objection to the

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means. *See id.* at 280–81. Regulatory offenses differ from the types of crimes punishable at common law, which were deemed *mala in se*, or wrong in themselves. *See Morissette v. United States*, 342 U.S. 246, 251–57 (1952) (distinguishing common law and regulatory offenses).

<sup>6</sup> Another frequently voiced complaint about the scope of modern criminal codes is that they contain a host of outmoded “morals” offenses, commonly understood as offenses that punish even “victimless” crimes principally as a means of expressing moral disapproval. *See, e.g.,* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 296–331 (1968). Even when the moralistic impulses that originally gave rise to such laws have abated, and such laws have fallen into desuetude, the laws remain enforceable at the whim of law enforcement agents and prosecutors. A case in point is the White Slave Traffic Act, also known as the Mann Act, which as originally passed prohibited the transportation of females “for the purpose of prostitution or debauchery, or for any other immoral purpose.” Ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2006)). Although largely unenforced today, the prospect of federal prosecution for a dalliance with a prostitute was serious enough to force former New York state governor Eliot Spitzer to resign from office. *See* Danny Hakim & William K. Rashbaum, *No U.S. Prostitution Charges Against Spitzer*, N.Y. TIMES, Nov. 7, 2008, at A1.

number of criminal laws on the books (which is viewed as too high) and to the reach of those laws (which is viewed as too broad).<sup>7</sup>

It is important to recognize, however, that overcriminalization has *qualitative* dimensions—dimensions that may be even more significant to the integrity and efficacy of the criminal law than its better-known quantitative aspects. Simply put, overcriminalization tends to degrade the quality of criminal codes and to undermine the effort, important to retributivists and utilitarians alike,<sup>8</sup> to provide just and proportional punishments for offenses. For example, a code that is too large and grows too rapidly will often be poorly organized, structured, and conceived. The resulting laws may not be readily accessible or comprehensible to those subject to their commands. Moreover, a sprawling, rapidly growing criminal code is especially likely to contain crimes in which the all-important conduct (*actus reus*) and state of mind (*mens rea*) elements are incompletely fleshed out. These kinds of drafting and interpretive flaws can give unwarranted and perhaps unintended sweep to criminal laws and threaten disproportionately severe punishment.

As a strategic matter, the difficulty with the standard conception of overcriminalization (and, at the federal level, the federalization of crime) is that it points to a disease for which there is no possible cure. Framing overcriminalization as a quantitative problem leaves only two possible solutions: either legislatures must repeal, or courts must declare unconstitutional, large swaths of existing criminal codes. No one thinks either prospect is likely, and for good reason, given entrenched patterns of legislative and judicial behavior.<sup>9</sup> To the extent that overcriminalization, understood as a quantitative problem, is what ails American criminal law, the prognosis is grim indeed.

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<sup>7</sup> See generally Stuntz, *supra* note 1. A closely related phenomenon, not strictly speaking falling under the heading of overcriminalization, is overpunishment—the constant push to increase penalties by, for example, imposing mandatory minimum sentences and raising maximum punishments.

<sup>8</sup> See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 887–88 (2005).

<sup>9</sup> According to the leading account of the political economy of criminal law, lawmakers' political and institutional incentives "*always* push[] toward broader liability rules, and toward harsher sentences as well." Stuntz, *supra* note 1, at 510. The Constitution, as presently interpreted, not only fails to counteract this dynamic, it actually *promotes* it, albeit unintentionally, by regulating criminal procedure and taking a *laissez faire* approach to the funding of indigent criminal defense and to substantive criminal law (i.e., what can and cannot be punished criminally, and how crimes must be defined). This is perverse, Professor Stuntz explains, because it "encourage[s] bad substantive law and underfunding." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997). Viewed as a quantitative matter, in short, overcriminalization is a problem without a constitutional "fix."

Fortunately for overcriminalization's many critics—among whom I count myself<sup>10</sup>—many of the qualitative problems associated with overcriminalization can be addressed without heroic self-restraint by legislatures or activism by the courts in limiting legislative lawmaking powers. Lifting the quantitative blinders, as this Article advocates, reveals that there is much the courts can do on their own, without resort to any constitutional blunderbuss, to help the legal system overcome overcriminalization. First, however, the nation's judges need to take a long, hard look in the mirror. If they do, they will find that they, along with legislatures and prosecutors, share in the blame for overcriminalization. This realization will no doubt come as a shock to them, and it should. The good news is that realizing their contributory role in overcriminalization should give them a sense that they have the power—and, indeed, the *responsibility*—to construe criminal statutes in ways that make overcriminalization far less objectionable in practice, if not tolerable (or, as some would have it,<sup>11</sup> possibly even positive in certain contexts).

The remainder of this Article is organized as follows. Part II shows that courts, not just legislatures, share in the blame for overcriminalization. That is because courts routinely expand the scope of ambiguous criminal statutes, giving inadequate attention to cogent reasons for adopting narrower interpretations.<sup>12</sup> Part III identifies some of overcriminalization's leading qualitative problems. This discussion underscores the notion established in Part II that courts have taken a criminal justice system characterized by rampant overcriminalization and made it considerably broader and harsher. Part IV identifies interpretive strategies that courts, properly sensitized to the qualitative problems of overcriminalization, can and should employ to ameliorate those problems—strategies that, importantly, do not require courts to blaze new and unlikely trails in constitutional law or to hope against hope for self-restraint by legislatures and prosecutors.

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<sup>10</sup> See, e.g., Smith, *supra* note 8.

<sup>11</sup> See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

<sup>12</sup> As the statement in the text suggests, my focus is on statutory interpretation. Thus, I do not address the other means through which the federal courts have greased the skids of overcriminalization: their expansive interpretation of Congress's power to punish crimes under the Commerce Clause, which has served as the primary basis for the federalization of crime. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (ruling that Congress can regulate home-grown marijuana raised for personal medicinal use); *United States v. Scarborough*, 431 U.S. 563 (1977) (holding that Congress can regulate the possession of any item that, at any time, has crossed a state line, even years after the item has come to rest in a particular state); *United States v. Perez*, 402 U.S. 146 (1971) (allowing Congress to regulate intrastate activities that, in the aggregate, have commercial effects).

As will become clear, the discussion of overcriminalization in this Article focuses on federal criminal law. The phenomenon, however, is hardly unique to the federal system. State legislators, prosecutors, and judges have the same incentives as their federal counterparts to expand the scope of criminal liability and increase penalties.<sup>13</sup> Indeed, in some respects, overcriminalization may be even more entrenched at the state level. After all, most state chief prosecutors and judges are elected by the public, giving them even stronger incentives than their federal counterparts to cultivate reputations for being “tough” on the kinds of crimes the public worries the most about, including crimes of violence and street crimes.<sup>14</sup>

On the other hand, it may well be the case that overcriminalization is more readily and more commonly exploited at the federal level than the state level. State prosecutors have far less agenda control than federal prosecutors. State enforcement efforts are necessarily devoted to “politically necessary cases,” such as murders, rapes, drug dealing, burglaries, and thefts.<sup>15</sup> These cases are understood to be the responsibility of state enforcers—which is why, for example, people who witness murders or drug deals call the police, not the Federal Bureau of Investigation or the Drug Enforcement Administration—and so state prosecutors simply do not have the luxury that their federal counterparts have to pass over serious crimes in favor of the overcriminalization horror stories that come from the federal system.<sup>16</sup> Moreover, precisely because the state system is on the front lines of the proverbial war on crime, state enforcers face enormous resource constraints, both in terms of prosecutorial time<sup>17</sup> and prison

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<sup>13</sup> See generally Stuntz, *supra* note 1, at 529–46 (comparing the institutional incentives of actors in state and federal criminal law).

<sup>14</sup> See generally *id.* at 533–34, 540 (discussing the motivations and incentives of directly elected prosecutors and judges). For an argument that reelection concerns push elected prosecutors and judges to enforce the death penalty with unwarranted vigor, see Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 307–33 (2008).

<sup>15</sup> Stuntz, *supra* note 1, at 543.

<sup>16</sup> These horror stories include small businessmen imprisoned for almost ten years for importing lobsters in safe containers that comported with American packaging standards but allegedly not those of a foreign nation, and an accident victim being convicted for having inadvertently wandered into a federal wilderness area on a snowmobile during a blinding blizzard. See, e.g., Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23, 2011, at A1. For a collection of similar cases, see, for example, *Case Studies*, OVERCRIMINALIZED.COM, <http://www.overcriminalized.com/CaseStudy.aspx> (last visited Nov. 26, 2012).

<sup>17</sup> See, e.g., Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266–79 (2011).

space.<sup>18</sup> State legislatures struggling to deal with competing fiscal priorities during a sustained economic downturn characterized by large budget deficits are in no position to grant substantial increases in funding for law enforcement and corrections.<sup>19</sup> In this environment, states cannot afford to waste prosecutorial and prison resources on the sort of hypertechnical, “victimless” offenses that are prosecuted federally.

Finally, even if state prosecutors were to prosecute such offenses, they would encounter a substantial obstacle that federal prosecutors do not: broadly unconstrained judicial sentencing discretion. Most jurisdictions lack harsh statutory mandatory minimums and rigid sentencing mandates resembling the controversial federal sentencing guidelines—and, importantly, the federal guidelines retain much of their harsh, discretion-constraining effect even after being declared only “advisory” in *United States v. Booker*.<sup>20</sup> Thus, it is considerably more likely that the overcriminalization horror stories would generate significantly more lenient punishment if prosecuted in state court, which further reduces the incentive for resource-constrained state prosecutors to pursue those kinds of charges in the first place.

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<sup>18</sup> See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 34 (Dec. 2011, rev. Feb. 9, 2012), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf> (demonstrating widespread prison overcrowding nationally). Prison overcrowding may turn out to be an even bigger issue for states after *Brown v. Plata*, 131 S. Ct. 1910 (2011), which upheld the authority of federal courts to order states to release prisoners held in unconstitutional conditions resulting from prison overcrowding. As a result of *Plata*, California has been ordered to release more than 30,000 prisoners over the next two years, and more than a dozen other states may face similar prisoner-release orders. See Michael Doyle, *Ruling on Prison Overcrowding a Warning to States?*, MCCLATCHY (May 24, 2011), <http://www.mcclatchydc.com/2011/05/24/114702/ruling-on-prison-overcrowding.html>.

<sup>19</sup> A pertinent recent example comes from Indiana. Republican Governor Mitch Daniels bucked opposition from Indiana prosecutors and spearheaded an effort (so far unsuccessful) to reduce the grades of certain nonviolent crimes and to create more effective alternatives to imprisonment for low-grade offenders. He did so to fend off a projected double-digit percent increase in the state’s already overcrowded prison system, which would require an additional \$1.2 billion in state spending. See Carrie Ritchie, *Nonviolent Crime Might Get Less Time*, INDIANAPOLIS STAR, Dec. 16, 2010, at B1.

<sup>20</sup> 543 U.S. 220 (2005). As I have explained elsewhere: “Even where there is no applicable statutory mandatory minimum, the ‘advisory’ guidelines powerfully constrain discretion. That is because the ‘advisory’ guidelines system created by *Booker* exerts significant pressure on district judges not to impose sentences below the range recommended by the guidelines.” Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 144 (2009) (citing data showing widespread post-*Booker* sentencing within the guidelines range). See generally Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (explaining that even advisory federal guidelines serve to anchor federal sentences in the guidelines).



## II. THE JUDICIAL CONTRIBUTION TO OVERCRIMINALIZATION

Courts (and especially the federal courts) like to portray themselves as the victims in the vicious cycle of overcriminalization, left defenseless in the face of rapacious efforts by legislatures and prosecutors to use criminal codes for their own selfish ends. Self-pity comes through loud and clear, for example, in the federal judiciary's repeated complaint that its judges are overworked processing criminal cases that belong in state court.<sup>21</sup> This is the basic story the leading lights in the academy have bought into: legislatures are responsible for overcriminalization because they enact so many criminal laws and cast them in such expansive terms, and no responsibility is laid at the doorstep of the judiciary.<sup>22</sup> This, in my view, lets the courts off far easier than the facts warrant.

Far from being innocent bystanders in overcriminalization, judges have been all too willing to construe ambiguous (and, at times, not-so-ambiguous) criminal statutes expansively. Even unelected federal judges enjoying life tenure seem to view themselves as having an obligation to ensure that morally blameworthy defendants will not slip through cracks in the criminal law. In focusing on the culpability of the conduct prosecutors are seeking to convict, federal courts often lose sight of the proportionality of the penalties to which their expansive interpretations subject defendants. The inevitable result of how courts approach their interpretive tasks is broader and more punitive criminal codes.

The following sections document, from both the quantitative and qualitative perspectives, the significant contribution of the federal courts to overcriminalization. Even with the more than four thousand (and counting) criminal prohibitions Congress has enacted so far, there would still be significant areas of activity reserved to state law enforcement but for

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<sup>21</sup> See, e.g., William H. Rehnquist, *Congress Is Crippling Federal Courts*, ST. LOUIS POST-DISPATCH, Feb. 16, 1992, at 3B (arguing that the federal judiciary "cannot possibly become federal counterparts of courts of general jurisdiction, which are required to take virtually all kinds of cases, without seriously undermining their usefulness in performing their traditional role and jeopardizing those qualities that have made them special").

<sup>22</sup> Professor Stuntz, for example, attributes the remarkable breadth and depth of federal and state criminal law to "tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges," who "cannot separate these natural allies." Stuntz, *supra* note 1, at 510; see also, e.g., Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983 (1995) (arguing that the "explosion of new federal criminal statutes has serious costs" and "threatens to impair the quality of the justice meted out in criminal cases and significantly impairs federal judges' ability to perform their core constitutional functions in civil cases"); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1166 (1995) ("If the federal justice system is to function effectively and continue to dispense justice, the legislative and executive branches of government must exercise restraint.").

expansive interpretations of ambiguities in those laws. In these instances, the federal courts have dramatically broadened the scope of conduct that can be prosecuted federally, sometimes with surprisingly little evidence that Congress intended the broad interpretation, compounding the quantitative aspect of overcriminalization.<sup>23</sup> The federal courts' penchant for construing criminal statutes broadly is also problematic from the qualitative view because courts often override legislative grading choices—and create risks of disproportionately severe punishment—by expanding statutes prescribing higher penalties to include conduct for which less severe punishment is provided in other laws. Thus, the courts have been playing the overcriminalization game right along with the political branches—unwittingly, perhaps, but playing all the same—and the federal criminal code is as broad and harsh as it is today in large part because the federal courts helped make it that way.<sup>24</sup>

A. EXPANSIVE CONSTRUCTIONS OF CRIMINAL STATUTES: A  
QUANTITATIVE OBJECTION

From the quantitative perspective, the most striking evidence of the judiciary's contribution to overcriminalization comes from cases where the federal courts construed statutes in ways that created otherwise absent bases for federal prosecution. Not surprisingly, given the steady growth of federal criminal law, these cases are rare. When a type of crime is regulated at the federal level, there is usually a multiplicity of applicable federal statutes.<sup>25</sup> Consequently, it will rarely be the case today that whether or not a particular kind of crime can be prosecuted federally will turn on the

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<sup>23</sup> This phenomenon also gives rise to a critique that the courts are engaging in crime creation under the guise of statutory interpretation, in violation of the maxim that the legislature is the only appropriate body to create crimes. *See infra* notes 108–14 and accompanying text.

<sup>24</sup> State courts, too, routinely broaden the reach of ambiguous criminal statutes, and so the same basic story could be told of the state courts. *See generally* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 901 (2004) (noting that even in states where the rule of lenity, or the doctrine of strict construction of criminal statutes, is formally the rule, “rigorous applications of lenity are extremely rare”).

<sup>25</sup> Fraud is a perfect illustration:

[T]he federal criminal code contains . . . exactly three hundred and twenty-five provisions that prescribe criminal penalties for fraud [or fraudulent behavior] . . . . These frauds range in statutory maximum penalties from a fine of \$300 or \$1000 or six months' imprisonment to 10 years or 20 years or life. These latter provisions are not aberrational: the federal code contains fifty fraud statutes that provide for a maximum penalty of ten years or more. It also contains at least triple that number that are misdemeanors, with the rest obviously falling in between one and ten years.

Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 *BUFF. CRIM. L. REV.* 249, 289–90 (1998) (footnotes omitted).

interpretation of a single federal statute. Nevertheless, there are some striking examples, and they powerfully illustrate the generative role that the courts have played in the federalization of crime.<sup>26</sup>

### *I. Sex Crimes*

A well-known example is *Caminetti v. United States*,<sup>27</sup> a case involving prosecutions of men for transporting their mistresses across state lines. The sole basis for federal prosecution was the Mann Act, more formally known as the White Slave Traffic Act. As passed in 1910, the Mann Act made it a federal crime to “transport[] . . . in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.”<sup>28</sup> The Act’s colorful title and legislative history made it clear that it was aimed at “trafficking” in females,<sup>29</sup> but the Supreme Court construed the law as including any form of illicit sex, including voluntary prostitution and adultery.<sup>30</sup>

The consequences of the *Caminetti* decision were staggering. With that decision, federal prosecutors were empowered, for the first time, to use federal criminal law to police sexual mores throughout the nation. Federal prosecutors aggressively used this new authority over the ensuing decades, waging what one commentator describes as a “morals crusade” against extramarital sex.<sup>31</sup> This authority remains in place today despite subsequent statutory revision.<sup>32</sup>

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<sup>26</sup> For a more extensive treatment of these cases, see Smith, *supra* note 8, at 896–908.

<sup>27</sup> 242 U.S. 470 (1917).

<sup>28</sup> Ch. 395, § 2, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2006)).

<sup>29</sup> The House Report was emphatic on the limited scope of the law:

The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter into and continue in a life of prostitution.

H.R. REP. NO. 61-47, at 9–10 (1910).

<sup>30</sup> *Caminetti*, 242 U.S. at 485–86. The *Caminetti* dissenters, by contrast, advocated a considerably narrower interpretation, arguing that “everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute’s graphic phrase ‘white-slave traffic.’ And it was such immorality that was in the legislative mind, and not the other.” *See id.* at 502 (McKenna, J., dissenting).

<sup>31</sup> *See* DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 139–60 (1994). In the immediate aftermath of *Caminetti* (1917–1928), “prostitution cases were not the true focus of the federal efforts;” rather, “the targets were generally . . . adulterers and lovers.” *Id.* at 159–60. In 1924, for example, an incredible 70%

The broad interpretation adopted in *Caminetti* would have been justified if, as the majority claimed, that interpretation were compelled by the plain meaning of the statute. The statute, however, was not nearly as plain as the majority claimed. The conduct prohibited by the Mann Act, prostitution and “debauchery,” involved more than just sexual deviancy; it involved *open and notorious* sexual misconduct.<sup>33</sup> This fact is highly significant for the stated legislative objective of protecting women from being “enslaved” in lives of sex trafficking.

At the time the Mann Act was passed, women who had lost their reputations for “chastity” would face diminished opportunities for marriage, and thus might find themselves destitute. As the moral crusaders of the day feared, women in these dire circumstances might be forced into lives of prostitution, a form of compulsory service commonly described at that time as a form of “slavery.”<sup>34</sup> Under the familiar principle of *ejusdem generis*,<sup>35</sup> the Act’s catchall phrase (“any other immoral purpose”) could easily have been limited to the kinds of illicit sex that truly threatened to “enslave” women in lives of prostitution, without doing violence to the statutory text. The Court, however, was apparently blinded by the fact that, under the mores of the day, any sex outside of marriage was considered wrongful. Thus it endorsed the transformation of a criminal law aimed specifically at forced sex trafficking into a law reaching any type of sex that might be deemed “immoral.”

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of those convicted under the Mann Act were “interstate adulterers or boyfriends and girlfriends.” *Id.* at 155. It was not until a shift in Justice Department policy in 1962 that the law went “virtually unenforced in noncommercial settings, except for rape.” *Id.* at 242.

<sup>32</sup> The Mann Act was amended in 1986, just shy of its eightieth anniversary, to make the statute gender-neutral and to replace the outmoded concept of “debauchery” and the catchall phrase with more modern language. See Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. § 2421 (2006)) (prohibiting interstate transportation “with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense”). In the “significant minority” of states in which adultery and other forms of consensual sex outside of marriage remain crimes, federal prosecutors thus retained authority to prosecute interstate transportation for those purposes. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 21 (1998).

<sup>33</sup> See Smith, *supra* note 8, at 900–01.

<sup>34</sup> See generally LANGUM, *supra* note 31, at 125–27.

<sup>35</sup> This interpretive principle posits that where general words follow the enumeration of specific words in a statute, the general words are to be read as limited to the same type of objects as the specific words. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2007).

## 2. Fraud

A more modern example of how broad interpretations of ambiguous criminal statutes have brought into the federal system classes of crimes that might otherwise have been subject to state prosecution—one which, unlike the Mann Act, continues to generate considerable federal enforcement activity today—is fraud. The mail fraud statute was passed in 1872 to allow federal prosecutions of swindlers who used the mail to cheat people out of money or property.<sup>36</sup> Congress, however, did not define “fraud,” and the question soon arose whether federal prosecutors could create new conceptions of “fraud,” unknown either to common law or state criminal law, as a basis for a mail fraud conviction.

The Supreme Court answered that question in the affirmative in *Durland v. United States*.<sup>37</sup> The case involved the sale of bonds on the basis of a false promise to repay the investment, with interest, when the bond matured at a future date.<sup>38</sup> Although it was clear at the time that false promises as to future events did not constitute “fraud” (which required misrepresentations of existing facts), the Court held that the mail fraud statute was not limited to the common law definition of “fraud.”<sup>39</sup> Rather, the statute broadly encompassed any and all deceptive means by which persons might be cheated out of money or property.<sup>40</sup> Federal prosecutors, in effect, could make up their own notions of “fraud”—and, as the “intangible rights” cases show,<sup>41</sup> there was (and is) no limit to prosecutors’ imagination in inventing creative new theories of “fraud.”

Although *Durland* involved an effort by federal prosecutors to go beyond existing definitions of “fraud” under state law, the Supreme Court has also allowed prosecutors to use the mail fraud statute to expand upon prevailing federal definitions of “fraud.” A good example is *Carpenter v. United States*.<sup>42</sup> The case involved securities, mail, and wire fraud charges premised upon a scheme by a newspaper reporter and others to misappropriate from the *Wall Street Journal* and trade upon confidential, pre-publication information about publicly traded companies.<sup>43</sup> It was unclear at the time whether such behavior constituted securities fraud (because the victim of the fraud, the newspaper, did not trade in the affected

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<sup>36</sup> Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (current version at 18 U.S.C. § 1341 (2006)).

<sup>37</sup> 161 U.S. 306 (1896).

<sup>38</sup> *Id.* at 312.

<sup>39</sup> *Id.* at 313–14.

<sup>40</sup> *Id.*

<sup>41</sup> See *infra* text accompanying notes 49–56.

<sup>42</sup> 484 U.S. 19 (1987).

<sup>43</sup> *Id.* at 22–24.

securities), and the *Carpenter* Court evenly divided on that question.<sup>44</sup> The fact that the defendants' securities scheme might well not violate the securities laws did not prevent the Court from concluding, unanimously, that the scheme fell within the mail and wire fraud statutes.<sup>45</sup>

This situation is not unique to securities fraud. By unmooring the definition of "fraud" from its common law origins, the federal courts have allowed prosecutors to charge as "fraud" activities that are regulated by, and possibly allowed under, bodies of law specifically regulating those activities, such as corporate law. The result has been federal prosecution of a stunning array of misbehavior involving breaches of contract, conflicts of interest, ethical lapses, and violations of workplace rules that otherwise would not be federal crimes (and, in some cases, may not have been crimes at all).<sup>46</sup>

To be sure, the Court has occasionally been willing to limit the reach of the mail and wire fraud statutes. For example, notwithstanding *Durland*'s seeming rejection of all common law limiting principles bearing on the meaning of "fraud," the Court has subsequently looked to common law in several cases.<sup>47</sup> In none of these cases, however, did the Court overturn *Durland* or suggest that the mail fraud statute is limited to the common law meaning of fraud. These efforts to impose at least some limits on the scope of mail and wire fraud accomplish little real restraint on the ability of federal prosecutors to use the mail and wire fraud statutes as broad tools for prosecuting any kind of wrongdoing that can be reclassified as "fraud." That is why, more than a century after its enactment, the mail fraud statute remains what one distinguished former prosecutor described as every federal prosecutor's "true love."<sup>48</sup>

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<sup>44</sup> *Id.* at 24.

<sup>45</sup> *Id.* at 28. It was not until a decade later, in *United States v. O'Hagan*, 521 U.S. 642 (1997), that such trading was held to constitute securities fraud. Even if *O'Hagan* had come out the other way, misappropriation would still have been subject to prosecution as mail and wire fraud under *Carpenter*.

<sup>46</sup> See generally John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

<sup>47</sup> See *Neder v. United States*, 527 U.S. 1, 4 (1999) (holding that materiality is an implied element in prosecutions for mail fraud); *McNally v. United States*, 483 U.S. 350, 360 (1987) (holding that the object of a scheme to defraud must be acquisition of money or property, as opposed to "intangible rights" such as the right to "good government" or "honest services"). *McNally* and the "intangible rights" doctrine are addressed in more detail below. See *infra* text accompanying notes 49–56. Similarly, in *Cleveland v. United States*, 531 U.S. 12, 15 (2000), the Court held that government-issued licenses obtained through deceptive means do not count as "property" and thus cannot support mail and wire fraud charges.

<sup>48</sup> Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

### 3. State and Local Corruption

Perhaps the most striking example of the federal courts dramatically extending the reach of federal criminal law involves bribery at the state and local level. Although Congress has long prohibited bribery schemes involving federal officials,<sup>49</sup> bribes involving their state and local counterparts were generally left to state enforcement, and the federal government did not, as one case put it, “set[] standards of disclosure and good government for local and state officials.”<sup>50</sup> So far as federal law was concerned, state and local officials could be prosecuted for purely local instances of bribery only if the bribes pertained to their participation in federal programs or performance of official functions on behalf of the federal government.<sup>51</sup>

The federal courts were quick to fill this gap. From the 1940s until 1987, the lower courts had given prosecutors free rein to prosecute bribery at the state and local level as “intangible rights” fraud.<sup>52</sup> These cases held that undisclosed corruption, self-dealing, conflicts of interest, or violations of workplace rules by fiduciaries cheat their victims of a variety of “intangible rights,” such as an employer’s right to the “honest services” of employees or the right of voters and citizens to have elections and

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<sup>49</sup> See, e.g., 18 U.S.C. § 201(b) (2006) (bribery); § 666 (federal program bribery).

<sup>50</sup> *McNally*, 483 U.S. at 360.

<sup>51</sup> The federal program bribery statute, 18 U.S.C. § 666, covers bribery by state and local officials if their agency “receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.” § 666(b). Section 201, the bribery statute applicable to federal officials, also applies to state and local officials to the extent they are acting as agents of the federal government. See *Dixson v. United States*, 465 U.S. 482, 498–501 (1984). With the enactment of the Travel Act, 18 U.S.C. § 1952 (2006), and RICO, 18 U.S.C. §§ 1961–1968 (2006), the coverage of state and local bribery was expanded as part of the war on organized crime. These crimes, however, are restricted in ways that make them ill-suited to serve as a basis for rooting out corruption within state and local government. The Travel Act requires proof of a particular federal jurisdictional nexus (such as interstate movement, interstate telephone calls, or use of the mails) and thus does not apply to purely localized bribery involving state and local officials. See § 1952(a). As for RICO, state law bribery is included in the laundry list of predicate crimes that can support a racketeering prosecution. See § 1961(1)(A). Given, however, that a “pattern of racketeering” is a necessary element of a RICO charge, RICO cannot be used against a single act of bribery or even multiple episodes of bribery that are sporadic in nature. See § 1961(5) (providing that a pattern of racketeering “requires at least two acts of racketeering . . . within ten years”). In short, from a federal enforcement perspective, the problem with these tools for prosecuting state and local bribery is that they are too narrow to reach many bribery schemes.

<sup>52</sup> See, e.g., *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974); *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941). The “intangible rights” doctrine, though fashioned primarily as a basis for prosecuting governmental corruption, was also used as a basis for prosecuting undisclosed kickbacks and bribes involving commercial actors. See, e.g., *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973).

governmental affairs conducted honestly and impartially.<sup>53</sup> These cases “substantially extended the concept of fraud” because the key element of deception was treated as “satisfied by nondisclosure of dishonest or corrupt actions, and the loss of an intangible right obviated the necessity to determine whether the scheme caused any economic loss.”<sup>54</sup>

Although it wisely (albeit, belatedly) rejected this dramatic expansion of federal authority in *McNally v. United States*,<sup>55</sup> the Supreme Court deserves little credit either for judicial restraint or for respecting federalism. After all, the Court inexplicably sat on the sidelines for almost half a century as corruption enforcement under the “intangible rights” doctrine became entrenched as a major focus of federal enforcement efforts, which virtually guaranteed that Congress would overturn the *McNally* outcome. It took just a year for the Department of Justice to obtain a statute resurrecting the “intangible rights” doctrine and putting federal prosecutors back in the business of setting ethical standards for state and local officials under the guise of rooting out “fraud.”<sup>56</sup>

Ironically, just a few years after *McNally* exempted state and local bribery from the reach of the mail fraud statute, the Court expanded a law carrying a considerably harsher penalty, the Hobbs Act,<sup>57</sup> to encompass state and local bribery. Both before *McNally* and after its rapid demise, federal prosecutors, again with the approbation of the lower courts, prosecuted bribery under the Hobbs Act as “extortion under color of official right.”<sup>58</sup> In *Evans v. United States*,<sup>59</sup> the Supreme Court endorsed this

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<sup>53</sup> See *McNally*, 483 U.S. at 362–64 (Stevens, J., dissenting) (surveying pre-*McNally* intangible-rights case law from the lower courts).

<sup>54</sup> NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 132 (2000).

<sup>55</sup> 483 U.S. 350 (1987) (holding that the necessary object of a fraudulent scheme is the acquisition of money or property, not “intangible rights,” from the victim through deceptive means).

<sup>56</sup> See 18 U.S.C. § 1346 (2006) (providing that deprivations of “the intangible right of honest services” can constitute mail and wire fraud). Ultimately, of course, the Supreme Court declared § 1346 void for vagueness as applied to conduct other than bribery and kickbacks. See *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010).

<sup>57</sup> 18 U.S.C. § 1951 (2006). The Hobbs Act makes it a crime, punishable by up to twenty years in prison, for anyone to “affect[] commerce” in any way by means of “robbery or extortion.” § 1951(a). This penalty was considerably higher than the five-year maximum traditionally authorized for mail and wire fraud.

<sup>58</sup> “Extortion” is defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” § 1951(b)(2). The first appellate case to endorse the notion that official-right extortion could encompass bribery was *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972).

<sup>59</sup> 504 U.S. 255 (1992).



creative use of the Hobbs Act. It did so despite the fact that, by that time, there was no longer any gap to fill in federal law: Congress had already resurrected the “intangible rights” doctrine of mail and wire fraud as a basis for prosecuting corrupt officials of state and local government.

*Evans*, a prosecution of a county commissioner who accepted a bribe in connection with a local zoning matter, involved two questions. The first was whether bribery could constitute extortion. The second was whether the reference to “inducement” in the statutory definition of extortion precluded prosecution where the public official passively accepted (and thus did not affirmatively induce payment of) a bribe. The Court resolved both questions in favor of the government.<sup>60</sup>

What is so striking about the case is the lengths to which the majority went to expand the reach of the Hobbs Act. The common law treatment of extortion and bribery, which the majority and dissent debated at length, was unclear at best and thus did not compel the majority to treat passive acceptance of a bribe as a form of extortion.<sup>61</sup> Indeed, the definition of extortion expressly states that the victim’s consent to surrendering money or property has to be “*induced*” by some action on the part of the extortionist—namely, “force, violence, or fear, or . . . color of official right.”<sup>62</sup> To say the least, the requirement of inducement does not easily accommodate passive acceptance of an unsolicited bribe.<sup>63</sup>

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<sup>60</sup> See *id.* at 260 (concluding that “[e]xtortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe’”); *id.* at 266–68 (ruling that acceptance of an unsolicited bribe constitutes extortion under color of official right).

<sup>61</sup> Compare *id.* at 269–71, with *id.* at 280–84 (Thomas, J., dissenting). Noting that there were “substantial arguments” on both sides of that debate, Justice O’Connor sensibly declined to take a position on the relationship between extortion and bribery at common law. *Id.* at 272 (O’Connor, J., concurring in part and concurring in judgment). To be sure, Congress is presumed to intend the common law meaning when it uses a common law term. That presumption, however, only makes sense if the term had an established meaning in the common law.

<sup>62</sup> 18 U.S.C. § 1951(b)(2) (emphasis added).

<sup>63</sup> The inducement requirement does, however, make sense in the broader context of robbery and the other offenses created by the Hobbs Act. These offenses, without exception, require active use by the defendant of wrongful, coercive means to obtain the victim’s money or property. Robbery requires the defendant to use “actual or threatened force, or violence, or fear of injury,” § 1951(b)(1), just as extortion requires the use of “force, violence, or fear,” § 1951(b)(2). The point is even clearer with the other crime created by the Hobbs Act, for the defendant must “commit[] or threaten[] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section.” § 1951(a). Seen in light of these other Hobbs Act offenses, it only made sense to treat extortion under color of official right as involving a different kind of wrongful coercion—namely, the power of public office—to compel people to surrender their money or property.

Not to be prevented from reaching its preferred result, the majority gutted the inducement requirement. In its view, the inducement requirement either did not apply to extortion under color of official right or, if it did, “the wrongful acceptance of a bribe establishes all the inducement that the statute requires.”<sup>64</sup> No claim was made (or could have been made) that the *Evans* outcome was compelled by text or legislative intent. The Court simply deemed bribe-taking to be deserving of punishment and stretched the concepts of “extortion” and “inducement” under the Hobbs Act to create an independent basis for punishment in federal court.

#### 4. *Synthesis*

The cases discussed in this section show that those who object to the broad scope of federal criminal law should not direct their complaints solely at Congress. Needless to say, Congress has passed an astonishing number of criminal statutes, but this flurry of legislative activity does not fully account for the federalization of crime. Time and again, the federal courts—from the Supreme Court down to the lower courts—have taken ambiguous (and, in the case of the Hobbs Act, not-so-ambiguous) criminal statutes and dramatically expanded their reach. As a result of their almost Pavlovian penchant for broadly construing federal criminal laws, whole areas of federal law that otherwise would be largely or entirely beyond the reach of federal prosecutors have been swept within the federal enforcement apparatus. Therefore, if federal criminal law is too broad in its reach, as so many rightly believe, federal judges share in the blame for that unfortunate state of affairs.

#### B. EXPANSIVE CONSTRUCTIONS OF CRIMINAL STATUTES:

##### A QUALITATIVE OBJECTION

The previous section dealt with situations in which federal courts broadly construed criminal statutes to create new avenues for federal prosecution and conviction. This section deals with the same basic problem in a far more common situation: overlapping federal criminal statutes prescribing different penalties for a particular kind of crime. It is, of course, to be conceded at the outset that some degree of redundancy across crimes is inevitable and unobjectionable.<sup>65</sup> Nevertheless, the rampant redundancy

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<sup>64</sup> *Evans*, 504 U.S. at 266.

<sup>65</sup> For example, physical attack that can be prosecuted as assault and battery can also constitute homicide if death results. Although these crimes overlap, they protect victim interests of differing weight, and the penal consequences of prosecuting a fatal beating as murder instead of assault, though dramatic, are justified by the fact that death resulted and by the defendant’s seriously culpable state of mind in inflicting the beating.

of federal criminal law is problematic when courts allow prosecutors to exploit the situation to redefine federal crimes and to drive up the penalties Congress prescribed for a particular crime.

All too frequently, courts have either created or exacerbated redundancies across criminal statutes by broadly construing generic federal statutes carrying higher penalties to encompass conduct that is subject to lower penalties under more specific federal statutes.<sup>66</sup> In these contexts, the incremental punishment is determined solely by an arbitrary factor—namely, the prosecutor’s choice as to which statute to proceed under<sup>67</sup>—rather than differences in culpability or a considered legislative judgment that higher penalties are warranted for that type of behavior.

Needless to say, the pervasive problem of overlapping federal crimes was not, strictly speaking, created by the federal courts. The prime culprit is Congress, and the root of the problem is that there are just too many different federal statutes on the books regulating fraud and other misdeeds—or so it would appear. On closer inspection, however, this is yet another example of courts taking a bad situation created by Congress and making it even worse. The multiplicity of overlapping crimes is not problematic in itself, nor is it necessarily problematic that such overlapping crimes may be defined or punished differently. If, for example, courts held that prosecutors must use the most specific of overlapping statutes, it would be irrelevant whether there is just one applicable statute on the books or dozens (or, in the case of federal fraud laws, hundreds).

Major problems have arisen in the context of overlapping criminal statutes only because of how courts have responded to this situation. Where such overlap exists, courts have held that, absent either a double-jeopardy violation or specific legislative intent to make a particular crime exclusive of other crimes, prosecutors are free to pick and choose among the

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<sup>66</sup> See *infra* text accompanying notes 69–100.

<sup>67</sup> In those circumstances, prosecutors will naturally charge the offense carrying the highest penalty regardless of whether that sanction is commensurate, morally speaking, with the defendant’s culpability. Indeed, they are *required* to do so by Department of Justice policy: “It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.” Memorandum from Attorney Gen. John Ashcroft to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing 2 (Sept. 22, 2003), *available at* [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm). This so-called “Ashcroft Memorandum” allows exceptions in certain enumerated “limited circumstances” (such as the defendant having assisted prosecutors in the apprehension of other suspects), but only with prior approval of designated Justice Department superiors. *Id.*

applicable statutes as they see fit.<sup>68</sup> As with so many other features of federal criminal law, the redundancy of the federal criminal code translates into more lawmaking and sentencing power for prosecutors—and even greater leverage to extract guilty pleas from defendants. Prosecutors can use their power to select the applicable charge from among overlapping statutes to evade express limitations in the definition of crimes and to ratchet up the punishment that convicted defendants face.

The following subsections explore these two ways in which federal courts have allowed prosecutors to exploit overcriminalization to their own advantage.

### *1. Redefinition of Crimes*

Fraud offenses illustrate how courts have allowed prosecutors to use redundancies across federal statutes to redefine crimes. One example, already discussed, is *Carpenter v. United States*.<sup>69</sup> Even though it was doubtful at the time that buying securities based on confidential information misappropriated from a third party constituted securities fraud, prosecutors were able to obtain a fraud conviction anyway. All they had to do was add to their dubious securities fraud charge mail and wire fraud charges based on the distribution of the newspaper from which the confidential information was stolen. The effect on the outcome in *Carpenter* was dramatic: the Justices divided four to four on whether to uphold the securities fraud conviction, but unanimously held the defendants guilty of mail and wire fraud.<sup>70</sup>

Credit-card fraud is another example of how mail and wire fraud can be used to redefine other crimes. The credit-card fraud statute does not permit federal prosecution unless the fraud exceeds a specific monetary amount.<sup>71</sup> Presumably Congress imposed a monetary limit to prevent prosecutors from making a “federal case” out of small-scale frauds involving credit cards. Credit-card authorization and billing, however, invariably involves some use of the mails and interstate wires. As such,

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<sup>68</sup> The Supreme Court has “long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.” *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979). *Batchelder* held that, even when there are multiple federal laws aimed at precisely the same criminal act, prosecutors can elect to use the harsher of the two laws. *Id.*; see also, e.g., *United States v. Computer Scis. Corp.*, 689 F.2d 1181 (4th Cir. 1982) (holding that prosecutors can proceed under the mail and wire fraud statutes for conduct that falls within the False Claims Act, 18 U.S.C. § 287 (2006)).

<sup>69</sup> See *supra* text accompanying notes 42–45.

<sup>70</sup> Compare *Carpenter v. United States*, 484 U.S. 19, 24 (1987), with *id.* at 28.

<sup>71</sup> The current monetary limit for most purposes is \$1,000 in any given year. See 15 U.S.C. § 1644(a), (d), (f) (2006).

prosecutors can evade the monetary limit imposed by Congress by prosecuting fraudulent uses of credit cards below the limit as mail or wire fraud instead of credit-card fraud.<sup>72</sup>

## 2. Potentially Disproportionate Punishment

### i. RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>73</sup> was passed in 1970 to give federal prosecutors more effective tools for eradicating organized crime. The purpose of the statute is clear: to protect “enterprises” against being infiltrated and put to criminal uses by organized crime. That explains why the commission of racketeering crimes does not violate RICO unless it is directed against an “enterprise” or involves the use of an “enterprise” to commit a pattern of racketeering activity.<sup>74</sup> The clear implication is that the “enterprise” was and, apart from the intervention of organized crime, would have remained a legitimate organization existing for commercial or other lawful purposes.

Nevertheless, in *United States v. Turkette*,<sup>75</sup> the Supreme Court endorsed efforts by the Justice Department to turn RICO on its head. Prosecutors argued that an associated-in-fact RICO “enterprise” could be a crime family or gang, in which case mere participation in the nefarious affairs of the group would violate RICO, quite apart from efforts to

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<sup>72</sup> In *United States v. Maze*, 414 U.S. 395 (1974), the Court recognized that, even after enactment of the credit-card fraud statute, the fraudulent use of credit cards could be prosecuted as mail fraud. In fact, Chief Justice Warren Burger’s dissent specifically endorsed the use of the mail fraud statute to skirt restrictions contained in more specific fraud statutes. *Id.* at 406 (Burger, C.J., dissenting) (“The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct.”).

<sup>73</sup> 18 U.S.C. § 1961–1968 (2006).

<sup>74</sup> Subsections 1962(a), (b), and (d) prohibit racketeers from using (or conspiring to use) the methods of organized crime, or money generated through such methods, to gain a toehold in an “enterprise,” and subsection (c) is the completed offense in which the “enterprise” has already not only been infiltrated but also corrupted by being used to commit a pattern of racketeering activity. § 1962(a)–(d). The “infiltration” understanding of RICO is made explicit in the statute’s preamble, which declares that RICO was intended to stop the “money and power” of “organized crime” from being “used to infiltrate and corrupt legitimate business and labor unions.” Organized Crime Control Act of 1970, Pub. L. No. 91-452, pmbl., 84 Stat. 922, 923. The legislative history supports this view: “[N]owhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business.” Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 680 (1987).

<sup>75</sup> 452 U.S. 576 (1981).

infiltrate legitimate businesses or groups. *Turkette* endorsed this innovative use of RICO, and did so precisely because a contrary result would leave “[w]hole areas of organized criminal activity . . . beyond the substantive reach of the enactment.”<sup>76</sup>

The result in *Turkette* may seem unassailable, but only if the issue is viewed solely in terms of culpability. The balance tips in favor of the opposite result when proportionality of punishment is considered. The import of *Turkette* is that crooks who get together to commit at least two of a wide variety of crimes under state or federal law can constitute a RICO “enterprise” and can be convicted under RICO even if they do nothing to infiltrate a legitimate business. That holding, though just as applied to organized criminals, creates the danger that garden-variety conspiracies can be prosecuted as RICO violations. This is so because a conspiracy is simply an agreement between two or more people to commit, or assist in the commission of, any crime or series of crimes.<sup>77</sup> Given the breadth of the predicate crimes that trigger RICO (particularly mail and wire fraud), *Turkette* threw open the door to RICO prosecutions for innumerable conspiracies that otherwise would be prosecuted under ordinary conspiracy law.

The penal effects of allowing RICO to subsume conspiracy law are enormous. Under the federal conspiracy statute, the maximum penalty for conspiring to commit a federal crime is five years.<sup>78</sup> RICO, however, allows up to twenty years in prison for each substantive violation and for each conspiracy to violate RICO.<sup>79</sup> The reason that RICO carries such heavy penalties is obvious: Congress knew that organized crime is, for a variety of reasons—including its highly structured nature, its continuity, the vast economic resources at its disposal, and its tendency to expand into legitimate sectors of the economy—far more dangerous than ordinary criminal conspiracies (such as a stick-up man and the getaway-car driver who rob a couple of banks). Allowing ordinary conspiracies to be charged as RICO violations, however, subjects ordinary conspiracies involving almost any kind of serious crime (and a number of comparatively minor felonies as well) to the *same* draconian penalty that Congress crafted for organized crime. Therefore, *Turkette* created a serious problem of disproportionate punishment for ordinary conspiratorial behavior.<sup>80</sup>

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<sup>76</sup> *Id.* at 589.

<sup>77</sup> *See, e.g.*, MODEL PENAL CODE § 5.03 (1962).

<sup>78</sup> *See* 18 U.S.C. § 371 (2006).

<sup>79</sup> *See* § 1963(a). The twenty-year maximum becomes life imprisonment in the event any racketeering activity committed is punishable by life imprisonment. *Id.*

<sup>80</sup> Indeed, the danger of disproportionate punishment was present in *Turkette* itself. As Professor (now Judge) Gerard Lynch explains:

To its credit, beginning in *Turkette* itself, the Supreme Court tried to ameliorate the problem it created of associated-in-fact “enterprises” swallowing up ordinary conspiracies,<sup>81</sup> but, true to form, the Court eventually gave up on those efforts and returned to its crime-expanding, punishment-enhancing ways. In *Boyle v. United States*, the defendant argued that juries must be instructed that an associated-in-fact RICO “enterprise” cannot be found unless, as *Turkette* itself had suggested, it had some type of ascertainable structure beyond the bare minimum necessary to commit the predicate crimes.<sup>82</sup> The Court disagreed, emphasizing the “obviously broad” definition of “enterprise,” which it viewed as susceptible to no limitation.<sup>83</sup>

The Court’s sweeping discussion in *Boyle* not only makes no pretense that a RICO “enterprise” must be more than a conspiracy. It virtually concedes that proof of a conspiracy provides sufficient evidence of an associated-in-fact “enterprise.” Using reasoning that at times bordered on sophistry, the majority claimed that such an “enterprise” must indeed have some sort of structure, but ruled that juries cannot be instructed as to the type or degree of structure that counts, leaving juries almost no alternative but to infer the necessary (but undefined) structure from the bare fact that the members of the alleged “enterprise” acted in concert.<sup>84</sup> The dissent was

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Granted that Turkette himself had made crime into a full-time livelihood, his ‘organization’ seems to have consisted of a couple of people with whom he committed robberies from time to time, and a few others he recruited to help when he was asked to arrange a few fires. It is not immediately clear why Turkette and his cronies should be subject to any greater punishment . . . [than] any other criminals guilty of multiple crimes.

Lynch, *supra* note 74, at 705 (footnote omitted).

<sup>81</sup> In dictum the lower courts would later find to be significant in the effort to limit RICO liability to acceptable bounds, *Turkette* declared that the enterprise “is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates [comprising the enterprise] function as a continuing unit.” *Turkette*, 452 U.S. at 583. In several cases, the Court added that the “pattern of racketeering” essential to a valid RICO charge cannot be shown simply by proving two or more racketeering crimes were committed within ten years. A valid “pattern” also requires proof of “continuity” (that the scheme lasted or would have lasted for an extended period of time) and that the racketeering activities bore some “relationship” to each other (such as manner of commission, intended victims, or purpose). See *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (reading “continuity” and “relationship” requirements into the definition of “pattern”); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (suggesting that two acts of racketeering may not be enough to constitute a “pattern”).

<sup>82</sup> 556 U.S. 938, 947–48 (2009).

<sup>83</sup> *Id.* at 944; see also *id.* at 950 (emphasizing the “clear but expansive text of the statute”).

<sup>84</sup> *Id.* at 945–49. Tellingly, although the majority found it “easy to envision situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise,” *id.* at 947 n.4, it offered only one. That lone example is

thus exactly right in its claims that the majority “render[ed] the enterprise requirement essentially meaningless in association-in-fact cases” and made RICO violations “indistinguishable from conspiracies to commit predicate acts.”<sup>85</sup> With *Boyle*, the danger of disproportionate punishment that arose in *Turkette* from allowing RICO to be used when the “enterprise” is a group of individuals associated to commit crimes is now complete: so far as the law of RICO is concerned, prosecutors have free rein to use RICO to ratchet up the five-year maximum punishment under 18 U.S.C. § 371 for conspiracies to commit federal crimes to the much higher punishments RICO affords.

## ii. Bribery, Gratuities, and Extortion

The application of the Hobbs Act to bribery has already been discussed at some length and thus can be treated briefly here.<sup>86</sup> Recall that, in *Evans v. United States*,<sup>87</sup> the Supreme Court held that state and local bribery can constitute extortion under color of official right. That holding produced a significant effect on the punishment of such bribery, which had a five-year maximum (if prosecuted as “intangible rights” fraud) but, as extortion, had a maximum punishment of twenty years.<sup>88</sup>

In addition, *Evans* brought a whole category of corruption that Congress graded as far less culpable than bribery or extortion—namely, illegal-gratuities offenses—into the Hobbs Act under the rubric of “bribery.” Under the federal bribery statute, 18 U.S.C. § 201, the receipt of

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where “several individuals, independently and without coordination, engage[] in a pattern of crimes listed as RICO predicates.” *Id.* This is significant because it is only *without* the coordination and shared purpose that conspirators necessarily have that the majority could claim that individuals committing racketeering crimes do not constitute a RICO “enterprise.” With the common purpose and coordination that inheres in the very notion of a conspiracy, the conspirators are easily (if not invariably) classified as an associated-in-fact “enterprise” under *Boyle*.

<sup>85</sup> *Id.* at 957 (Stevens, J., dissenting).

<sup>86</sup> See *supra* notes 57–64 and accompanying text.

<sup>87</sup> 504 U.S. 255 (1992).

<sup>88</sup> Less dramatic, but nonetheless troubling, is the effect *Evans* had on the penalty for bribery involving *federal* officials. If the federal bribery statute was the sole basis for prosecuting bribery at the federal level, the maximum punishment available would be fifteen years. See 18 U.S.C. § 201(b) (2006). Under *Evans*, however, bribery involving federal officials can be charged as extortion under color of official right under the Hobbs Act, which carries a maximum of twenty years imprisonment. *E.g.*, *United States v. Stephenson*, 895 F.2d 867 (2d Cir. 1990). Allowing federal officials to be prosecuted for extortion under color of official right under the Hobbs Act produces yet another strange result: the penalty for such extortion by federal officials, which otherwise would be three years, increases almost seven-fold to twenty years. See 18 U.S.C. § 872 (“Whoever, being an officer, or employee of the United States or any department or agency thereof, . . . under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both . . .”).



illegal gratuities is sharply distinguished from, and graded as far less culpable than, bribery. Bribery requires a *quid pro quo*, understood as a corrupt effort to trade on public office, whereas illegal gratuities may reflect nothing more than compensation from unauthorized sources for acts performed in the honest exercise of public office.<sup>89</sup> The penalties that § 201 provides for the two distinct offenses clearly reflect the greater seriousness of bribery as compared to illegal-gratuities offenses: bribery is punishable by up to fifteen years, roughly eight times the two-year maximum for illegal-gratuities offenses, and permanent disqualification from future federal office.<sup>90</sup> Accordingly, Congress clearly viewed illegal-gratuities offenses as distinct from, and far less blameworthy than, bribery.

*Evans* obliterated the distinction between the two crimes and, in doing so, subjected illegal-gratuities offenses to the severe punishment Congress reserved for bribery. While paying lip service to the *quid pro quo* requirement as a defining feature of bribery, the *Evans* majority diluted that vital requirement. Under federal bribery statutes, the *quid pro quo* requirement mandates proof of “specific intent to give or receive something of value *in exchange* for an official act.”<sup>91</sup> No such specific intent, however, is required under *Evans*. The Court was explicit on this point: “We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”<sup>92</sup>

The phrasing of the knowledge requirement is key because it simply restates the *mens rea* standard for illegal-gratuities offenses under § 201(c). A violation of the illegal-gratuities law “requires the presence of three separate elements: that the defendant (i) knowingly gave a thing of value; (ii) to a public official or person selected to be a public official; (iii) for or because of any official act performed or to be performed.”<sup>93</sup> The *Evans*

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<sup>89</sup> The Supreme Court has explained the distinction between the two crimes in the following terms:

Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999) (quoting 18 U.S.C. § 201(b) (bribery); § 201(c) (gratuities)).

<sup>90</sup> Compare 18 U.S.C. § 201(b) (bribery), with § 201(c) (gratuities).

<sup>91</sup> *Sun-Diamond Growers*, 526 U.S. at 404–05.

<sup>92</sup> *Evans*, 504 U.S. at 268.

<sup>93</sup> United States v. Schaffer, 183 F.3d 833, 840 (D.C. Cir. 1999), *vacated as moot*, 240 F.3d 35 (D.C. Cir. 2001).

definition of extortion under color of official right is indistinguishable from the typical formulation of the illegal-gratuities offense. In both cases, the specific intent “‘to be influenced’ in an official act” necessary for a bribery conviction is conspicuously absent.<sup>94</sup> The lack of intent to be influenced makes sense for gratuities offenses because, as one treatise notes, the “gravamen” of such offenses is “not an intent to be corrupted or influenced, but simply the acceptance of an unauthorized compensation.”<sup>95</sup> It makes no sense, however, for bribery, the whole point of which is to punish corrupt bargains in which official acts are traded for private gain.

This nonsensical result is exactly what *Evans* allows. As lower courts have recognized, public officials who accept payments from private parties can be convicted under the *Evans* standard even absent proof that the officials intended to be influenced in an official act.<sup>96</sup> In other words, *Evans* allows conviction under the Hobbs Act not just for bribery, but also for what amounts to an illegal-gratuities offense.

The sentencing consequences of *Evans* are, by any measure, dramatic. By expanding extortion under color of official right to include illegal-gratuities offenses, the Court subjected gratuities offenses to the same punishment as bribery under the Hobbs Act. This is directly contrary to Congress’s assessment, as reflected in the federal bribery law, that gratuities offenses are far less culpable than bribery. Moreover, allowing gratuities offenses to be prosecuted as extortion produces a ten-fold increase in the maximum punishment Congress provided under the federal illegal-gratuities statute for the same conduct. Gratuities offenses are subject to a two-year maximum under § 201(c) but twenty years under the Hobbs Act as construed in *Evans*. These substantial increases in punishment all stem from the expansion of the Hobbs Act to include voluntary wealth transfers

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<sup>94</sup> *Sun-Diamond Growers*, 526 U.S. at 404.

<sup>95</sup> SARAH N. WELLING ET AL., *FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO* § 7.4, at 216 (1998).

<sup>96</sup> After surveying the case law on this point, the Seventh Circuit concluded:

We therefore join the circuits that require a *quid pro quo* showing in all [Hobbs Act] cases [involving payments to public officials]. That said, we also agree . . . that the government need not show an explicit agreement, but only that the payment was made in return for official acts—that the public official understood that as a result of the payment he was expected to exercise particular kinds of influence on behalf of the payor.

*United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001). Of course, as an evidentiary matter, intent to be influenced might be *inferred* from proof that an official accepted a payment with knowledge that it was offered for or because of a future official act, but, absent such an inference, such proof alone would be insufficient to convict for bribery. Under *Evans*, however, such proof is *itself* a sufficient basis for conviction, and lack of intent on the part of the official to be influenced is no defense.

to public officials instead of restricting the statute to transfers that the public official coerced through misuse of the power of public office.

iii. Mail and Wire Fraud

For almost a century, the penalty for mail and wire fraud was no more than five years imprisonment. That changed in the wake of recent corporate accounting scandals. In 2002, Congress increased the punishment for both offenses to twenty years.<sup>97</sup> The substantial increase in penalty gives prosecutors powerful new incentives to use the mail and wire fraud statutes to ratchet up the punishment offenders would face under other federal fraud statutes.

Few federal anti-fraud statutes carry penalties as severe as mail and wire fraud now do, and a good number of those statutes provide for considerably lower penalties. Conspiracies to defraud the United States are punishable by five years maximum, as is the filing of false or fraudulent claims with federal agencies.<sup>98</sup> The maximum punishment for credit-card fraud and health-care fraud is ten years.<sup>99</sup> In all of these cases (and many more),<sup>100</sup> prosecutors can, simply by charging mail and wire fraud violations, drive up the maximum punishment defendants would otherwise face under federal statutes dealing with their specific kind of fraudulent activity.

3. *Synthesis*

As the above discussion shows, overlapping criminal statutes are commonplace in the federal system. That is Congress's fault. Courts, however, are to blame for allowing federal prosecutors carte blanche to exploit rampant redundancies in federal criminal law in ways that redefine crimes, allowing prosecutors to sidestep express limitations Congress prescribed for certain crimes, and to ratchet up the maximum punishment defendants face upon conviction. These results are possible only because of judicial choices—namely, choices not to treat specific offenses as exclusive of generic crimes but to construe more severely punished generic crimes to encompass crimes for which Congress specifically provided lower

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<sup>97</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (amending 18 U.S.C. §§ 1341, 1343 to increase the five-year maximum for mail and wire fraud). The legislation also made securities fraud a twenty-year offense. § 1106 (amending 15 U.S.C. § 78ff(a)).

<sup>98</sup> See 18 U.S.C. § 287 (false claims); § 371 (conspiracy).

<sup>99</sup> See 15 U.S.C. § 1644 (credit-card fraud); 18 U.S.C. § 1347 (health-care fraud).

<sup>100</sup> The discussion so far has centered on some of the more frequently used fraud statutes, but this is just the tip of the iceberg because there are literally hundreds of anti-fraud provisions in federal criminal law. See Standen, *supra* note 25, at 289–90.

punishment. In other contexts, courts have adopted exclusivity principles designed to prevent such end-running of congressional intent,<sup>101</sup> but not in the case of overlapping crimes. Again, courts have joined with Congress in making federal criminal law harsher than necessary.

It is puzzling that courts have been so willing to allow prosecutors to exploit the redundancies in federal criminal law in ways that override specific congressional choices as to the proper definition of crimes and the proper penalty for a criminal act. A bedrock principle of American criminal justice is legislative supremacy—the idea that it is for legislatures, not courts or law enforcement, to define what is a crime (and, in doing so, to prescribe the appropriate penalty).<sup>102</sup> From the vantage point of legislative supremacy, the courts' hands-off approach to redundancy in criminal law seems profoundly misguided. If Congress truly is to be supreme in matters

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<sup>101</sup> For instance, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court held that the federal cause of action against state actors for infringements of federally guaranteed rights, 42 U.S.C. § 1983 (2006), cannot be used by state prisoners to obtain release from imprisonment in lieu of the federal habeas corpus statute, 28 U.S.C. §§ 2241–2255 (2006). Despite the “literal applicability” of § 1983, the habeas statute “must be understood to be the exclusive remedy” for state prisoners challenging the fact or duration of their incarceration. *Rodriguez*, 411 U.S. at 489. Otherwise, prisoners could, simply by suing under § 1983 instead of the habeas statute, evade the express statutory requirement that habeas petitioners must exhaust available state-court remedies before challenging their convictions in federal court. Similarly, in *Great Am. Sav. & Loan Ass’n v. Novotny*, the Court held that a Reconstruction-era statute parallel to § 1983, 42 U.S.C. § 1985(3) (2006), cannot be used to enforce rights conferred by Title VII of the Civil Rights Act of 1964. 442 U.S. 366, 378 (1979). Title VII remedies must be treated as exclusive of § 1985(3) as a means of enforcing Title VII rights, *Novotny* held, because § 1985(3) would empower Title VII plaintiffs to “avoid most if not all of the[] detailed and specific provisions” of Title VII. 442 U.S. at 375–76. These cases reflect a longstanding principle of statutory interpretation: “As always, ‘[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment.’” *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)) (internal quotation marks omitted).

<sup>102</sup> This notion inheres in the “principle of legality.” As one leading scholar summarizes the concept: “The principle of legality . . . stands for the desirability in principle of advance legislative specification of criminal misconduct.” John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985). Although legality is often understood merely as a rejection of judicial crime creation, the principle reflects the broader notion, in Jeffries’s words, that only legislatures are “politically competent to define crime.” *Id.*; see also, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971) (stating that “because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity”). So understood, allowing law enforcement agents to decide what is or is not a crime is just as offensive to the principle of legality as judicial crime creation. Support for the broader understanding of legality can be found in its “operational arm,” Jeffries, *supra* at 196, the void-for-vagueness doctrine, which aims to prevent legislatures from using vague criminal statutes to delegate lawmaking power to police and prosecutors. See generally *id.* at 196–97.

of substantive federal criminal law, prosecutors should not be allowed to exploit the existence of overlapping crimes to override specific congressional policy judgments about the scope of—or proper penalty for—particular crimes.

The courts' approach to redundancies across federal criminal statutes becomes more understandable when viewed, as the courts evidently view it, solely in terms of culpability. Given the courts' reluctance to let fraud or other culpable behavior slip through the federal cracks, it makes sense that they would allow prosecutors to use broadly worded crimes, like mail and wire fraud, to avoid what might be called "near misses": situations where Congress has criminalized a particular form of behavior, but defined it in ways that allow some morally equivalent kind of behavior to escape prosecution under a particular statute. Once Congress has criminalized an act, signaling its determination that the behavior is sufficiently blameworthy to warrant federal prosecution, arguably no real harm is done if prosecutors use other criminal statutes to go after the same act or similar kinds of acts. Regardless of which statute is being used, the key point, from a culpability standpoint, is that prosecutors are pursuing acts that Congress deemed (or would have deemed) culpable.

It should now be clear that it is unsound to focus solely on the culpability of the behavior the prosecutor seeks to prosecute. The penal consequences must also be factored into the analysis. This additional consideration makes the case for exclusivity significantly stronger. Even if there is nothing wrong in principle with allowing prosecutors to use generic crimes to get around limitations written into a particular kind of crime, it makes little sense to allow prosecutors to exploit the redundancy of the criminal law to drive up significantly the punishment that a defendant would otherwise face for the same criminal act.<sup>103</sup> To do so, as courts do all

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<sup>103</sup> Importantly, the federal sentencing guidelines do not solve this problem. The guidelines do nothing at all about situations where an overlapping generic crime carries a mandatory minimum that the more specific crime does not. In this circumstance (which cannot be ignored given the proliferation of mandatory minimums throughout federal criminal law, *see infra* note 147 and accompanying text), the prosecutor's ability to convict under the generic crime would strip judges of the latitude they would have had under the specific statute to impose a sentence below the mandatory minimum. In other cases, where the difference between the generic and specific statutes lies in the maximum punishment, it is true that similar offenses are grouped together rather than processed under separate guidelines. So, for example, whether a public official is convicted of bribery under the federal bribery statute (which carries a fifteen-year maximum), 18 U.S.C. § 201, or of the same conduct as official-right extortion (which carries a twenty-year maximum under the Hobbs Act), 18 U.S.C. § 1951, the same sentencing guideline applies. In either case, the defendant starts out, for sentencing purposes, with a base offense level of fourteen. *See* U.S. SENTENCING GUIDELINES MANUAL § 2C1.1(a)(1) (2010). It would be wrong, however, to conclude that the choice of statute is irrelevant to sentencing. The higher statutory

the time, allows prosecutors to undermine one of the most basic policy determinations Congress makes when passing crimes—the severity of punishment convicted offenders potentially deserve—and contributes to the already considerable harshness of the federal criminal code.

### III. A QUALITATIVE CRITIQUE OF OVERCRIMINALIZATION IN FEDERAL CRIMINAL LAW

The main problem with overcriminalization is that it results in crimes that are often (if not usually) poorly defined—and poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability. Even if the number of crimes remains constant or continues to grow (which appears probable, if not inevitable), overcriminalization need not be the complete disaster that its many critics believe it to be. A body of federal criminal law that contains too many prohibitions and is too broad in scope can be improved immeasurably by remedying its many qualitative deficiencies.

One such deficiency—which some might understandably regard as the most significant—is the enormous overlap across federal criminal statutes, which typically results in inconsistent crime definition and offense grading. Having already discussed this issue in Part II,<sup>104</sup> the discussion here addresses other qualitative deficiencies in federal criminal law. These include: the poor organization of federal criminal statutes, sloppy legislative crime definition (which results in judicial crime creation), the inadequacy of federal mens rea requirements, and the paucity of defenses. Together, these features of federal criminal law make overcriminalization more than just troublesome in theory, but unacceptable in practice as well.

#### A. A “CODE” IN NAME ONLY

A major problem with federal criminal law, quite simply, is that we do not have a “federal criminal code” in any recognizable sense of the phrase. A “code” is a systematic body of laws that is organized into a coherent and

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maximum under the Hobbs Act, coupled with the breadth of the “relevant conduct” that goes into federal sentences, means that an official convicted of bribery under the Hobbs Act could receive a sentence in excess of the fifteen years authorized by § 201. The greater the differences in the relevant statutory maximums, the more likely it is that the ultimate sentence will exceed the lower one based on relevant conduct and other sentence enhancements. The ability of sentence enhancements to generate sentences at even high statutory maximums is shown most strikingly by federal fraud and drug offenses, where amount of loss and drug quantity, respectively, routinely generate enormous increases in sentences.

<sup>104</sup> See *supra* notes 65–103 and accompanying text.

cohesive whole.<sup>105</sup> That characterization does not even remotely fit the hodgepodge we refer to as “federal criminal law.”

Although Title 18 of the United States Code is entitled “Crimes and Criminal Procedure,” the roster of federal crimes is not contained in that or any other single title of the Code. Instead, they are scattered throughout the dozens of titles of the Code. That might not be a serious defect if the crimes were carefully organized and comprehensively indexed, but that is not the case.

As one participant in prior federal criminal law reform efforts has explained:

[T]he accumulated *ad hoc* enactments appear in a uniquely unhelpful arrangement. They are clumped together in a series of chapters bearing titles apparently chosen by lexicographers rather than lawyers versed in the penal law, and are laid out in alphabetical order of their titles (Aircraft and Motor Vehicles; Animals, Birds, Fish, and Plants; Arson; Assault; etc.) rather than by concept. Individual provisions have proven to be so difficult to find that, until a change in type fonts several years ago, the paperback edition of Title 18 consisted of approximately 500 pages of statutory text, and, in a vain attempt to provide the reader with some rough idea of the contents, 300 pages of an index.<sup>106</sup>

This state of affairs is unacceptable for several reasons. First, it makes it difficult for even specialists in criminal law to find the law, much less ordinary citizens trying to determine their legal obligations. This frustrates both the rule-of-law imperative that the criminal law should be accessible to the public so they can conform their behavior to it and potentially the notion that it is unfair to punish absent fair warning. Second, it complicates the task of effective crime definition. With such poor organization, it is no surprise that federal criminal law contains scores of overlapping crimes that address the same criminal act but, for no apparent reason, are defined or punished quite differently.<sup>107</sup>

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<sup>105</sup> This is the very premise of the civil law tradition and of Anglo-American codification efforts dating back to Jeremy Bentham (who is widely credited with coining the term “codification”). See generally Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 772 (2004) (explaining that the Benthamite, civil-law vision of law demands that legal rules be “set forth in advance in an accessible and precise canonical text which is expected to provide a clear . . . resolution of the vast majority of legal questions and human controversies”). Bentham himself argued that codes should be written and organized in the way that would be “best adapted for the generality of the people” and “most easily understood by the least skilful.” Jeremy Bentham, *A General View of a Complete Code of Laws*, in 3 THE WORKS OF JEREMY BENTHAM 22, 22 (John Bowring ed., 1843).

<sup>106</sup> Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 67 (1998) (footnotes omitted).

<sup>107</sup> As Justice John Paul Stevens wrote in a fairly recent case: “[A]t least 100 federal false statement statutes may be found in the United States Code. About 42 of them contain an express materiality requirement; approximately 54 do not. The kinds of false statements

## B. JUDICIAL CRIME CREATION

Another major problem with federal criminal law is that it allows courts essentially to create new crimes. The root of the problem here is that the courts are notoriously inconsistent in their adherence to the venerable rule of lenity. The rule of lenity—one of the few Marshall Court doctrines that has not achieved canonical status<sup>108</sup>—requires courts to construe ambiguous criminal laws narrowly, in favor of the defendant.<sup>109</sup> It does so not to show lenience to lawbreakers, but to protect important societal interests against the many adverse consequences that judicial expansion of crimes can produce—consequences such as the usurpation of the legislative crime-definition function, not to mention potential frustration of legislative purpose and unfair surprise to persons convicted under unclear statutes.<sup>110</sup> The rule of lenity therefore reflects, as Judge Henry Friendly once put it, a democratic society’s “instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.”<sup>111</sup>

More to the point here, faithful adherence to the rule of lenity would require courts to counteract overcriminalization. The rule of lenity requires courts to narrow, rather than broaden, the scope of ambiguous criminal laws. This would prevent prosecutors from exploiting the ambiguities of poorly defined federal crimes to criminalize conduct Congress has not specifically declared a crime. The rule of lenity would thus make poor crime definition an *obstacle* to—not an *occasion* or *excuse* for—more expansive applications of federal criminal law.

Unfortunately, the federal courts treat the rule of lenity with suspicion and, at times, outright hostility. Although it sometimes faithfully applies the rule of lenity, the Court has on many other occasions either ignored lenity or dismissed it as a principle that applies only when legislative

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found in the first category are, to my eyes at least, indistinguishable from those in the second category. Nor is there any obvious distinction between the range of punishments authorized by the two different groups of statutes.” *United States v. Wells*, 519 U.S. 482, 505–06 (1997) (Stevens, J., dissenting) (footnotes omitted).

<sup>108</sup> See *Wiltberger v. United States*, 18 U.S. (5 Wheat) 76, 95 (1820). Several prominent scholars have forcefully argued in recent years that the rule should be abolished. See Jeffries, *supra* note 102; Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

<sup>109</sup> See, e.g., *United States v. Bass*, 404 U.S. 336, 348 (1971).

<sup>110</sup> The Court has long recognized that the rule of lenity promotes fair warning and the separation of powers in matters of crime definition. See, e.g., *id.*

<sup>111</sup> *Id.* (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 196, 209 (1967)). The rule also has an important, albeit underappreciated, role in preventing courts from overriding legislative grading decisions by increasing the penalties for criminal acts. See generally Smith, *supra* note 8, at 934–44.



history and other interpretive principles cannot give meaning to an ambiguous statute.<sup>112</sup> Indeed, the federal courts so frequently disregard the rule of lenity that it is questionable whether it is even accurate today to describe it as a “rule”:

[T]he courts’ aversion to letting blameworthy conduct slip through the federal cracks has dramatically reversed the lenity presumption. The operative presumption in criminal cases today is that whenever the conduct in question is morally blameworthy, statutes should be *broadly* construed, in favor of the prosecution, unless the defendant’s interpretation is compelled by the statute . . . . The rule of lenity, in short, has been converted from a rule about the proper locus of lawmaking power in the area of crime into what can only be described as a “rule of severity.”<sup>113</sup>

The result of the judiciary’s haphazard adherence to the rule of lenity is as predictable as its results have been misguided. As previously explained, federal judges have repeatedly used ambiguous statutes as a basis for creating new federal crimes and have expanded the reach of overlapping federal crimes to drive up the punishment Congress prescribed for less serious federal crimes.<sup>114</sup> The end result of such assaults on the rule of lenity is necessarily a broader and more punitive federal criminal law.

### C. INADEQUATE MENS REA REQUIREMENTS

Another area of serious concern in federal criminal law is that statutory crimes often have inadequate mens rea requirements. In writing new crimes, Congress takes pains to identify the actus reus elements that describe the act to be prohibited, but all too often specifies no mens rea requirements or inadequate mens rea requirements. This is troubling because mens rea requirements are an essential safeguard against unjust convictions and disproportionate punishment.

As the Supreme Court explained in *Morissette v. United States*, the concept of punishment based on acts alone, without a culpable state of

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<sup>112</sup> *Muscarello v. United States*, 524 U.S. 125 (1998), exemplifies the dismissive treatment lenity usually receives in federal court. Faced with a statutory term that even the majority admitted had literally dozens of different dictionary meanings and no evidence of the meaning Congress intended, the majority simply chose the one it preferred, and in doing so brought the defendant under a strict, and otherwise inapplicable, mandatory minimum. *Id.* Where Justice Ruth Bader Ginsburg correctly saw an easy case for the rule of lenity, the majority dismissed the rule as irrelevant. Justice Stephen Breyer wrote: “The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended. To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute.” *Id.* at 138–39 (citations and internal quotation marks omitted). For a discussion of the Supreme Court’s schizophrenic case law on lenity, see Kahan, *supra* note 108, at 384–89.

<sup>113</sup> Smith, *supra* note 8, at 926.

<sup>114</sup> See *supra* Part II.

mind, is “inconsistent with our philosophy of criminal law.”<sup>115</sup> In our system, crime is understood as a “compound concept,” requiring both an “evil-doing hand” and an “evil-meaning mind.”<sup>116</sup> The historic role of the mens rea requirement is to exempt from punishment those who are not “blameworthy in mind” and thereby to limit punishment to persons who disregarded notice that their conduct was wrong.<sup>117</sup> Mens rea also serves to achieve proportionality of punishment for blameworthy acts—to make sure the law imposes a punishment that “fits” the defendant’s crime. It is mens rea, for example, that guarantees that the harsher penalties for intentional homicides will not be applied to accidental homicides.<sup>118</sup>

Importantly, the linkage between punishment and blameworthiness is no artifact from a bygone retributivist age. Although utilitarians reject the retributivist view that moral blameworthiness is the *justification* for punishment, most utilitarians agree that moral blameworthiness is an “important limiting principle” for criminal punishment.<sup>119</sup> The fundamental insight here is that there is considerable “utility” in moral “desert”—that a criminal law which distributes punishment according to blameworthiness will more effectively achieve its crime-prevention goals than one that punishes regardless of the moral sentiments of the community.<sup>120</sup>

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<sup>115</sup> 342 U.S. 246, 250 (1952).

<sup>116</sup> *Id.* at 251. Notice that, *Morissette*’s colorful reference to the “evil-doing hand” notwithstanding, the actus reus often is innocuous conduct. For example, the actus reus of mail fraud is simply using the mails, *see* 18 U.S.C. § 1341 (2006), and the actus reus of Travel Act violations is interstate or international travel, *see* 18 U.S.C. § 1952(a) (2006). The blameworthiness of such crimes comes entirely from mens rea—in the examples just given, the illicit purpose for which the mails or channels of commerce are used. *See* 18 U.S.C. § 1341 (intent to defraud); § 1952(a) (intent to commit crimes).

<sup>117</sup> *Morissette*, 342 U.S. at 252.

<sup>118</sup> *See* Smith, *supra* note 20, at 133–35. As a consequence:

[The role of mens rea] is broader than exempting morally blameless conduct from punishment. It involves limiting guilt and punishment in accordance with the blameworthiness of the defendant’s act. The means of doing so differs. In some cases, mens rea serves to carve morally innocent conduct out of the reach of a criminal statute whereas, in others, it ensures that morally blameworthy conduct will not be punished out of proportion with its level of blameworthiness; in still others, it does both. The goal, however, is the same: to ensure that guilt and punishment track the moral blameworthiness of the conduct that gives rise to liability.

*Id.* at 136.

<sup>119</sup> PACKER, *supra* note 6, at 66–67. Packer was not alone in this regard. As no less an authority than Oliver Wendell Holmes Jr. declared: “a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 50 (1881).

<sup>120</sup> *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (finding that deviations from moral desert can undercut the criminal law’s moral credibility and hence its power to gain compliance by its moral authority).

Despite the critical importance of mens rea to the effectiveness and legitimacy of federal criminal law, federal crimes often lack sufficient mens rea elements. Many federal crimes—including very serious crimes—contain no express mens rea requirements.<sup>121</sup> Perhaps more commonly, federal crimes include express mens rea requirements for part of the crime but are silent as to the mens rea (if any) required for others.<sup>122</sup> Here, it is evident that Congress intended to require mens rea, but it is unclear whether Congress intended the express mens rea requirement to exclude additional mens rea requirements.

In many cases, even when Congress includes mens rea terms in the definition of crimes, it uses terms such as “willfully” and “maliciously,” which have no intrinsic meaning and whose meanings may vary widely in different statutory contexts. Take, for example, “willfulness.” “Willfulness” has a chameleon-like quality in federal criminal law: “The word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law . . . a ‘willful’ act is one undertaken with a ‘bad purpose.’”<sup>123</sup>

The lack of consistent meanings attributed to express mens rea terms across statutes is inevitable given the large universe of mens rea terms used

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<sup>121</sup> To give but two examples, the National Firearms Act, 26 U.S.C. § 5861(d) (2006), construed in *United States v. Freed*, 401 U.S. 601 (1971), makes it a serious felony to possess unregistered grenades and other “firearms,” but contains no express mens rea requirements. Similarly, the Hobbs Act, 18 U.S.C. § 1951 (2006), makes it a crime to commit extortion, defined as obtaining money or property from another, with his consent, through the wrongful use of coercion, § 1951(b)(2). No mens rea requirements appear in the definition of the crime.

<sup>122</sup> The false statement statute, for example, requires that the false statement has been made “knowingly and willfully” but provides no mens rea requirement for the part of the crime requiring that the false statement has been made in a matter within the jurisdiction of a federal agency. See 18 U.S.C. § 1001. Similarly, the federal child-pornography law requires that the defendant “knowingly” transported or received a visual depiction, but prescribes no mens rea either for the sexually explicit nature of the visual depiction or the fact that it involved minors. See 18 U.S.C. § 2252(a).

<sup>123</sup> *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citations omitted). Even when the “bad purpose” definition of “willfulness” is adopted, there still may be no consistency of usage. In *Bryan*, the Court ruled that, in the context of a willful violation of federal firearms requirements, “willfulness” merely required proof that the defendant understood, in a general way, that his conduct was illegal. *Id.* In *Ratzlaf v. United States*, 510 U.S. 135 (1994), however, the Court adopted an even more stringent understanding of “willfulness.” In order to commit a willful violation of the prohibition against “structuring” a cash transaction in excess of \$10,000 into smaller transactions in order to evade currency transaction reporting requirements, the Court ruled, the defendant has to know specifically that “structuring” is illegal. *Id.* at 149.

in federal criminal law. According to the Brown Commission, known more formally as the National Commission for Reform of Federal Criminal Law, federal criminal statutes contain a “staggering array” of mens rea terms.<sup>124</sup> After noting almost eighty different mens rea requirements contained in federal crimes, the Commission explained:

Understandably, the courts have been unable to find substantive correlates for all of these varied descriptions of mental states and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.<sup>125</sup>

In situations where the crimes enacted by Congress contain incomprehensible or incompletely defined mens rea requirements, it is difficult, if not impossible, to know which elements will require mens rea and the precise level of mens rea that will be required. Unlike the drafters of the Model Penal Code, for example, Congress has enacted no default level of mental culpability that applies when statutes are silent as to mens rea.<sup>126</sup> Again in contrast to the Model Penal Code, there are no federal statutes that provide uniform definitions for mens rea terms<sup>127</sup> or supply interpretive rules specifying which elements require mens rea and, for the ones that do, how to determine the precise level of mental culpability that is required.<sup>128</sup> In all these respects, it is up to the federal courts to decide, on an ad hoc basis, what (if any) additional mens rea requirements to impose, and how to construe “willfulness” and other vague mens rea terms.

This confusing state of affairs might be acceptable if the courts provided the clear interpretive tools or methods that Congress has failed to enact. Unfortunately, however, the courts have been inconsistent in their approach to mens rea selection. Increasingly of late, the Supreme Court stands ready to read mens rea requirements into statutes that are wholly or partly silent as to mens rea, and the reason is that the Court has placed

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<sup>124</sup> 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 119 (1970).

<sup>125</sup> *Id.* at 119–20.

<sup>126</sup> See MODEL PENAL CODE § 2.02(3) (prescribing “recklessness” as the default MPC level of mental culpability).

<sup>127</sup> See § 2.02(2)(a)–(d) (defining “purpose,” “knowledge,” “recklessness,” and “negligence”).

<sup>128</sup> See § 2.02(1) (mandating that all “material elements” of MPC offenses require mens rea); § 2.02(4) (supplying interpretive rule to determine mens rea for all elements where mens rea is prescribed for part but not all of an MPC offense).

renewed emphasis on making a morally culpable state of mind a prerequisite to punishment.<sup>129</sup> This, however, is not invariably so.

Sometimes, courts treat legislative silence concerning mens rea as a legislative signal to dispense with mens rea requirements. This is especially the case with regulatory crimes protecting the public health, safety, and welfare. Even *Morissette v. United States*, with its strong emphasis on the traditional requirement that a culpable mental state is a prerequisite to punishment, conceded that the requirement may not apply to regulatory or other crimes not derived from the common law.<sup>130</sup> The Court seized on this statement in *United States v. Freed* as justification for treating a felony punishable by ten years in prison as a regulatory offense requiring no culpable mental state.<sup>131</sup>

To be sure, more recent cases cast doubt on *Morissette* and *Freed* in this respect. Among these cases are *Arthur Andersen LLP v. United States*,<sup>132</sup> *Ratzlaf v. United States*,<sup>133</sup> and *Staples v. United States*.<sup>134</sup> In each case, the Supreme Court adopted heightened mens rea requirements, and two of these cases (*Arthur Andersen* and *Ratzlaf*) went so far as to make ignorance of the law a defense.<sup>135</sup> Each time, the Court ratcheted up mens

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<sup>129</sup> A good example is *Staples v. United States*, 511 U.S. 600 (1994). In that case, the defendant was convicted for possession of an unregistered machine gun despite his claimed ignorance of his rifle's ability to fire automatically. *Id.* at 602–04. To the prosecution, all that mattered was that he knew his rifle was a gun. *Id.* at 606, 608–14. The Court disagreed. *Id.* at 619. In our gun-friendly culture, where ordinary firearms are lawful possessions in millions of households, mere knowledge that one is in possession of a gun fails to give notice of a potential violation. In order for the requisite culpable mental state to exist, the government must prove the defendant knew the characteristic of his gun (its automatic-firing capability) that placed it in the category of “quasi-suspect” weapons as to which citizens expect legal regulation. *Id.* at 602.

<sup>130</sup> See *Morissette v. United States*, 342 U.S. 246, 258–60 (1952). As unfortunate as *Morissette*'s dicta was in this respect, the Court had previously held that the category of regulatory offenses that *Morissette* later referred to as “public welfare offenses” “dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing.” *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (emphasis added).

<sup>131</sup> 401 U.S. 601, 607 (1971) (noting that common law crimes belong to a “different category” than the “expanding regulatory area involving activities affecting public health, safety, and welfare” as to which relaxed mens rea requirements apply).

<sup>132</sup> 544 U.S. 696 (2000).

<sup>133</sup> 510 U.S. 135 (1994).

<sup>134</sup> 511 U.S. 600 (1994).

<sup>135</sup> *Ratzlaf* held that, to be guilty of willfully violating the “structuring” ban, defendants must have known that “structuring” was illegal. See *Ratzlaf*, 510 U.S. at 136–37. *Arthur Andersen* held that ordering the destruction of documents to keep them out of the hands of federal investigators cannot be considered “knowing corruption,” within the meaning of 18 U.S.C. § 1512(b), unless the person who gave the order knew he was acting illegally. See *Arthur Andersen*, 544 U.S. at 706.

rea requirements for the stated purpose of preventing conviction for morally blameless conduct.

These cases, I believe, are best read as making a culpable mental state a prerequisite for punishment for *all* crimes, even regulatory offenses. As I have noted elsewhere:

[T]he Supreme Court has dramatically revitalized the mens rea requirement for federal crimes. The “guilty mind” requirement now aspires to exempt all “innocent” (or morally blameless) conduct from punishment and restrict criminal statutes to conduct that is “inevitably nefarious.” When a literal interpretation of a federal criminal statute could encompass “innocent” behavior, courts stand ready to impose heightened mens rea requirements designed to exempt all such behavior from punishment. The goal of current federal mens rea doctrine, in other words, is nothing short of protecting moral innocence against the stigma and penalties of criminal punishment.<sup>136</sup>

The fact remains, however, that *Freed* and cases like it have never been overturned. Unless that happens, confusion will persist—and, with it, the possibility that moral blameworthiness may be not be required for some crimes, especially regulatory offenses involving health and safety concerns.<sup>137</sup>

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<sup>136</sup> Smith, *supra* note 20, at 127 (footnotes omitted). See generally John S. Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

<sup>137</sup> Professor Jeffrey Meyer argues that this possibility has already materialized. On the goal of limiting punishment to blameworthy acts, he writes:

These ideals are no more than myth for most federal criminal cases today. For a wide range of the most commonly charged federal crimes, judges routinely instruct juries to convict defendants *regardless of their moral culpability*—that is, even if there is no proof or finding that the defendant knew she was doing something wrong.

Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 137 (2007). Although I agree with Meyer’s descriptive claim, I do not share his belief that federal mens rea doctrine is necessarily doomed to fail as long as it relies on judicial decisionmaking to exclude blameless conduct from punishment. As I argue elsewhere, the reason that blameless conduct can result in conviction, in spite of a doctrine of mens rea specifically designed to prevent that from happening, is that the doctrine is restricted in ways that prevent courts from responding in all cases with heightened mens rea requirements (including knowledge of illegality) that are essential to exempting blameless acts from punishment. See Stephen F. Smith, “Innocence” and the Guilty Mind, at 50–74 (2005) (unpublished manuscript) (on file with author). For example, even if knowledge of illegality is required to exempt blameless conduct from punishment, the Supreme Court will not make ignorance of the law a defense absent a textual indication from Congress, such as use of the term “willfully” or other language importing “a legal element in the definition of the offense,” *Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985), of legislative intent to require knowledge of the law. See generally Smith, *supra* at 51–61. Removing these counterproductive restrictions may well allow mens rea doctrine to achieve its important purposes without, as Meyer seems to propose, making jury trials freewheeling inquiries into moral blameworthiness.

One thing, however, is certain: as long as courts fail to make proof of a culpable mental state an unyielding prerequisite to punishment, federal prosecutors will continue to water down mens rea requirements in ways that allow conviction without blameworthiness. That is exactly what prosecutors did, for example, in *Arthur Andersen* during the wave of post-Enron hysteria over corporate fraud. In seeking to convict Enron's accounting firm of the "corrupt persuasion" form of obstruction of justice, prosecutors—flatly disregarding the lesson of cases like *Staples* and *Ratzlaf*—argued for incredibly weak mens rea requirements that, as the Court noted, would have subjected entirely innocuous conduct to punishment.<sup>138</sup>

Although the Supreme Court unanimously rejected the Justice Department's efforts and overturned Arthur Andersen's conviction,<sup>139</sup> the firm had less cause to celebrate than one might think. After being convicted on a prosecution theory so aggressive that it could not win even a *single* vote from the Justices, the company—once a "Big Five" accounting firm—went out of the consulting business.<sup>140</sup> Even now that it no longer stands convicted of a crime, its reputation has in all likelihood been damaged beyond repair. Its own conduct in the Enron matter had a lot to do with that, of course, but so did the overzealousness of federal prosecutors in exploiting the serious imperfections in federal mens rea doctrine. The Arthur Andersen episode simultaneously shows the need for substantial mens rea reform and the high cost of not having strong mens rea requirements in federal criminal law.

#### D. DISPROPORTIONATELY SEVERE PENALTIES

Of the wide array of critiques that have been leveled against federal criminal law in recent decades, one of the most consistent is that it frequently produces disproportionately severe sentences. Especially in the frequently prosecuted area of drug and firearms offenses (which account for roughly 40% of all federal prosecutions),<sup>141</sup> federal mandatory *minimum*

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<sup>138</sup> The government's interpretation would have made it a crime either to withhold documents from federal investigators or to destroy documents pursuant to the sort of document-retention policies that are commonplace in the business world, even if the person responsible for nondisclosure or destruction of the documents honestly believed he was acting lawfully—and even if the person did not know, or have reason to know, that the documents pertained to a federal investigation. See *Arthur Andersen*, 544 U.S. at 705–08.

<sup>139</sup> *Id.* at 697–98.

<sup>140</sup> See Agnes T. Crane, *Longing for Days of the Big Eight*, N.Y. TIMES, Oct. 28, 2011, at B2 (discussing the implications of the demise of Arthur Andersen's consulting business).

<sup>141</sup> According to 2011–2012 data, 39% of federal criminal defendants were charged with drug or weapons offenses. See ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 17–18 (2012).

sentences sometime equal or exceed the *maximum* punishment that would be available in state court for parallel offenses.<sup>142</sup> As a result of tough federal mandatory minimums and sentencing guidelines that are considerably harsher than those followed in many states, “similarly situated offenders now receive radically different sentences in federal and state court.”<sup>143</sup>

Even defenders of tough, guidelines-based sentencing have criticized the proliferation of mandatory minimums throughout federal law. As former U.S. District Judge Paul G. Cassell has noted, “many of the[] ‘horror stories’ [in federal sentencing] stem from mandatory minimums in general and the narcotics mandatory minimums in particular.”<sup>144</sup> Consistent with this view, the U.S. Sentencing Commission recommended long ago that statutory mandatory minimums be repealed in favor of its more context-specific, guidelines-based approach to sentencing.<sup>145</sup>

Despite these sensible recommendations, the number of provisions for mandatory minimum sentences, like the number of federal crimes, has increased considerably. Consider the following:

There are approximately one hundred different provisions in the federal criminal code imposing mandatory minimum sentences, and a number of these provisions concern the frequently prosecuted areas of drug and weapons offenses. The impact of these provisions is far greater than their number would suggest. For example, between 1984 and 1991 alone, “nearly 60,000 cases” were sentenced pursuant to mandatory minimums.<sup>146</sup>

The presence of such severe penalties on the federal books is directly related to overcriminalization, in two different respects. Most obviously, the extreme penalties that federal law affords are a product of overcriminalization. Higher penalties, like new crimes, are a cheap but

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Moreover, suspects charged with drug or weapons offenses “had the highest prosecution rates in 2009” (77% and 69%, respectively, as compared to a 58% rate of prosecution for crimes of violence). See U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 7 (Dec. 2011).

<sup>142</sup> See generally Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 674 (1997).

<sup>143</sup> Beale, *supra* note 22, at 982. As an example, Professor Beale cites federal drug offenses, which result in sentences that are often “ten or even twenty times higher” than the sentences that would be imposed in state court for the same conduct. *Id.* at 998–99.

<sup>144</sup> Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1045 (2004).

<sup>145</sup> See U.S. SENTENCING COMM’N, REPORT ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). In this regard, the Sentencing Commission followed the lead of the Judicial Conference of the United States, which passed a resolution in March 1990 urging Congress to “reconsider the wisdom of mandatory minimum sentence statutes.” *Id.* at G-1.

<sup>146</sup> Smith, *supra* note 8, at 895 (footnotes omitted).



politically effective means through which legislators can signal to their constituencies that they are “tough” on crime. Increased penalties also serve the interest of prosecutors by making it easier to extract guilty pleas from defendants.

Furthermore, the severity of federal penalties serves to exacerbate, in a fairly dramatic way, the problem of overcriminalization. The point is that federal prosecutors are much more likely to bring prosecutions for the kinds of crimes that carry unusually high penalties compared to those available under state law. The ability of high penalties to skew federal enforcement policies may explain why drug offenses are among the most commonly prosecuted federal crimes and why crimes regularly prosecuted in state court account for the bulk of the federal prosecutions annually.

To see the kind of mischief that unusually high federal penalties can cause, consider *United States v. Armstrong*.<sup>147</sup> By virtue of the infamous 100-to-1 crack/powder cocaine disparity,<sup>148</sup> federal sentences for offenders convicted of dealing crack cocaine far exceeded the penalties they would have faced had they not been targeted for federal prosecution. The high penalties under federal law resulted in more federal crack prosecutions—and enormous racial disparities in which 86% of federal defendants convicted for dealing crack were black (only 4% were white) and blacks “on average received sentences over 40% longer than whites.”<sup>149</sup>

#### E. INADEQUATE DEFENSES

Although not often recognized as such, defenses are an important element in the overcriminalization debate. The problem is not just that there are too many crimes and crimes are poorly defined. The deeper problem is that overcriminalization tends to treat the criminal law as a one-way ratchet: while crimes are continuously enacted and cast in very broad, capacious language (language that prosecutors and courts make *even broader* through expansive interpretations), the defenses to criminal liability are few in number and framed incredibly narrowly.

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<sup>147</sup> 517 U.S. 456 (1996).

<sup>148</sup> See *Kimbrough v. United States*, 552 U.S. 85, 96–98 (2007).

<sup>149</sup> *Id.* at 479–80 (Stevens, J., dissenting). In a historic move, Congress recently addressed this unjust situation, albeit in a manner that operates prospectively only. Under the Fair Sentencing Act of 2010, which passed with bipartisan support, Congress rejected the 100-to-1 rule in favor of a more defensible (but still arbitrary) 18-to-1 rule. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372 (amending 21 U.S.C. §§ 841, 844, 960). Congress also acted to ameliorate the harsh statutory mandatory minimums for crack offenses, raising the drug quantity necessary to trigger the mandatory minimums for crack and even going so far as to repeal outright the mandatory minimum for simple possession of crack. See *id.*

This is unfortunate because defenses have a vital role to play in keeping criminal liability within appropriate bounds. This is easy to see with “justification” defenses, such as self-defense and necessity. Such defenses exist to exempt from criminal liability otherwise illegal conduct that is morally justified in the circumstances.<sup>150</sup> Using force to repel a rapist or breaking into a house as a necessary means of rescuing an occupant from a deadly fire, for example, are exempt from punishment even though, in other circumstances, the law punishes using force against others or breaking into houses.

Other defenses, called “excuses,” differ from justification defenses in that excuses concern blameworthy conduct. Nonetheless, like justification defenses, excuses serve to prevent conviction in exceptional circumstances where punishment would be unfair.<sup>151</sup> Where, for example, a person committed a crime due to insanity or duress, the law withholds punishment—not because the crimes were morally appropriate or justified, but rather because, in such extreme circumstances, the lawbreaker cannot fairly be blamed for his crimes.

In the federal system, some crimes include statutory defenses specific to those crimes. The crime of perjury, for example, carries a recantation defense: if a witness voluntarily admits the falsity of a perjured statement in a timely manner, “such admission shall bar prosecution under this section.”<sup>152</sup> Such crime-specific defenses are rare, comparatively speaking. Most federal crimes contain no such defenses. In those situations, the only defenses available to defendants will be the classic common law defenses, such as insanity, necessity, duress, and entrapment—defenses that, with the exception of the insanity defense, are not recognized by statute.<sup>153</sup>

The federal courts have exacerbated the one-way ratchet nature of overcriminalization. The same courts that so often create *crimes* (by disregarding the rule of lenity and expansively interpreting ambiguous criminal laws) refuse to create *defenses* to crimes.

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<sup>150</sup> See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 13 (1968).

<sup>151</sup> See, e.g., *id.* at 13–14.

<sup>152</sup> 18 U.S.C. § 1623(d) (2006).

<sup>153</sup> The insanity defense is recognized by statute, but only because Congress sought to limit the defense in the wake of John Hinckley’s acquittal on insanity grounds for the attempted assassination of President Ronald Reagan. See 18 U.S.C. § 17 (2006). Prior to that point, the insanity defense, like other common law defenses, existed in the federal system through decisional law only.

In *Brogan v. United States*, for example, the Supreme Court refused to recognize an “exculpatory no” defense to false statement charges.<sup>154</sup> The majority declared, flatly, that “[c]ourts may not create their own limitations on [criminal] legislation, no matter how alluring the policy arguments for doing so,” the obvious implication being that it is for Congress alone to determine whether criminal conduct should be exempted from punishment.<sup>155</sup> Ironically, although courts will create crimes under the guise of statutory interpretation, they will not create defenses.

Worse still, a recent Supreme Court decision has called into serious question the very existence of the classic common law defenses. In *United States v. Oakland Cannabis Buyers’ Cooperative*,<sup>156</sup> a case involving whether medical necessity is a defense to federal drug charges, the majority opinion contained sweeping dicta suggesting that necessity and other nonstatutory defenses may be inappropriate in federal prosecutions. Absent codification by statute, the Court viewed the necessity defense (and, by extension, other common law defenses) not only as “controversial” but “especially so” because “federal crimes are defined by statute rather than by common law.”<sup>157</sup> The disturbing implication is that there may be *no defenses at all* in federal cases except those few specifically created by Congress.

#### IV. HOW COURTS CAN HELP OVERCOME (INSTEAD OF EXACERBATE) OVERCRIMINALIZATION

To the extent overcriminalization is as harmful as I have portrayed it, the next question is what, if anything, can be done about it. It is at this point that standard critiques of overcriminalization run into a brick wall. The usual assumption is that the only meaningful cure for the disease that is overcriminalization is legislative (Congress must repeal, and refrain from enacting, unnecessary criminal laws) or constitutional (the federal courts should use the Constitution to reduce the scope of criminal liability).<sup>158</sup> This assumption is as understandable as it is self-defeating. If overcriminalization is understood in quantitative terms, then any cure must involve sharply reducing both the number and scope of criminal laws, yet it

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<sup>154</sup> 522 U.S. 398 (1998). The “exculpatory no” doctrine would have exempted from punishment under the false statements statute, 18 U.S.C. § 1001 (2006), statements that consist only of a false denial of guilt.

<sup>155</sup> *Id.* at 408.

<sup>156</sup> 532 U.S. 483 (2001).

<sup>157</sup> *Id.* at 490. Ultimately, the Court did not rest on this broad ground but instead on the narrow ground that the Controlled Substances Act impliedly precluded necessity arguments for medicinal uses of marijuana and other “Schedule I” drugs. *See id.* at 492, 494–95.

<sup>158</sup> *See, e.g.,* sources cited *supra* note 22.

is exceedingly unlikely that Congress would be restrained in its use of the criminal sanction or that courts would be so activist as to declare unconstitutional large portions of federal criminal law.<sup>159</sup>

Once it is understood that overcriminalization also has qualitative elements—elements for which courts themselves bear a large share of the blame—it becomes apparent that there is a ready solution to overcriminalization short of heroic legislative self-restraint or judicial activism in curbing the power to punish crimes. This solution is for courts to interpret statutes in ways that counteract overcriminalization and the qualitative defects that overcriminalization produces. New interpretive strategies, tailored to the troubling realities of a criminal justice system characterized by overcriminalization and to the important normative goals of the system (such as limiting punishment in accordance with moral blameworthiness), can help right what is so fundamentally wrong with federal criminal law.

#### A. RESTORE THE RULE OF LENITY TO ITS RIGHTFUL PLACE

Given how often courts interpret criminal statutes expansively, it should be clear that courts do not simply let the weights on the interpretive scales determine whether statutes are to be read broadly or narrowly, as critics of the rule of lenity would have them do. Instead, the balance is heavily skewed in favor of the prosecution when the conduct in question is morally blameworthy, even when the consequence of a broad interpretation is to allow prosecutors to drive up considerably the punishment that would otherwise apply or to evade limitations the legislature included in the definition of the crime in more specific statutes. Whether the law enforcement need for expanded authority is real,<sup>160</sup> minimal,<sup>161</sup> or just

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<sup>159</sup> See *supra* note 9.

<sup>160</sup> *E.g.*, *United States v. Turkette*, 452 U.S. 576 (1981). See generally *Smith*, *supra* note 8, at 911–13 (discussing the implications of *Turkette* for efforts to eradicate organized crime).

<sup>161</sup> *Smith v. United States*, 508 U.S. 223 (1993), is a case in point. There, the defendant sought to trade a machine gun for drugs. He was convicted of multiple drug offenses, and presumably could have been convicted of any number of serious firearms offenses as well. Suffice it to say that there was no danger that he or others who purchase drugs with guns (much less *machine guns*) would slip through the federal cracks. The prosecutor, however, argued that exchanging guns for drugs constitutes use of a firearm “during and in relation to . . . [a] drug trafficking crime” pursuant to 18 U.S.C. § 924(c)(1)(A) (2006). One would think that such barter is not a terribly significant problem: even if trading guns for drugs is common (which is far from self-evident), it would surely be the rare drug dealer whose access to firearms depends on bartering customers. Nevertheless, the Court rejected the ordinary meaning of “using a gun” (which connotes employment as a weapon) and endorsed the “universal view of the courts of appeals” that the statute encompasses barter with, as well as more lethal “uses” of, guns. *Smith*, 508 U.S. at 233. That the Court stretched the statute

silly,<sup>162</sup> the one constant seems to be that courts will go to almost any length to keep blameworthy conduct from slipping through the federal cracks. Thus, it is closer to the truth to say that the operative interpretive rule in federal criminal cases is severity: that ambiguous statutes presumptively should be *broadly* construed to prevent culpable defendants from slipping through the federal cracks.

In practice, then, rejecting the rule of lenity tends to look a lot like endorsing anti-lenity (or a rule of severity). *That*, in turn, affords a substantial justification for taking lenity seriously even if, as a theoretical matter, an evenhanded approach to the interpretation of criminal statutes might be preferable to a strict-construction default. After all, even critics of lenity do not contend that criminal laws should always be interpreted broadly. Professor Kahan, for example, asserts that “federal criminal statutes should not uniformly be read either *narrowly* or *broadly*, but rather *appropriately* so as to carry out their purposes and to realize the full range of benefits associated with delegated lawmaking.”<sup>163</sup> The obvious assumption is that there is a viable interpretive middle ground between the lenity side of the spectrum (at which ambiguous statutes are always *narrowly* construed) and the anti-lenity or severity side of the spectrum (in which such statutes are always *broadly* construed), an assumption that is difficult to reconcile with the courts’ track record in interpreting federal crimes. Given that courts often miss valid reasons for narrowly construing statutes,<sup>164</sup> a consistently applied rule of lenity, under which *every* ambiguous criminal statute is read narrowly, is the right interpretive rule.

The political economy of criminal law confirms that lenity is the right interpretive default. The relevant question is which interpretive rule gives legislatures proper incentives to make their intentions clear concerning the scope and meaning of criminal statutes. To the extent legislatures generally

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to convict is all the more remarkable given the draconian penal consequences of its interpretation: for having bartered with a machine gun, Smith faced a mandatory *minimum* sentence of *thirty years*, to run *consecutively* with the sentence for his underlying drug convictions. *Id.* at 227; see § 924(c)(1)(A) (requiring that the mandatory minimum be imposed “in addition to the punishment provided for [the underlying] crime”).

<sup>162</sup> In *Carter v. United States*, 530 U.S. 255 (2000), the Court watered down the mens rea required to convict under the federal bank robbery statute, 18 U.S.C. § 2113, to “permit[] the statute to reach cases . . . where an ex-convict robs a bank [without any intent to abscond with the loot] because he wants to be apprehended and returned to prison.” *Carter*, 530 U.S. at 271. The reader will be forgiven for regarding this as a solution in desperate search of a problem.

<sup>163</sup> Kahan, *supra* note 108, at 426; see also Jeffries, *supra* note 102, at 220–21 (identifying situations in which criminal laws should be interpreted narrowly).

<sup>164</sup> See generally Smith, *supra* note 8, at 893–930.

share prosecutors' desire for broad criminal prohibitions,<sup>165</sup> a rigidly enforced rule of lenity would operate as an information-forcing default rule, giving legislatures added incentive to make their wishes known *ex ante*. Additionally, once an ambiguity arises, the question is whether prosecutors or defendants are in the best position to get the legislature to resolve the interpretive question. There is no doubt that prosecutors are best suited to the task of overcoming legislative inertia. As Professor Einer Elhauge explains, "there is no effective lobby for narrowing criminal statutes" whereas "an overly narrow interpretation is far more likely to be corrected . . . because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda."<sup>166</sup>

One might wonder what the point of enforcing the rule of lenity would be if legislatures can be counted upon to repeal decisions narrowing the reach of criminal statutes. The fact, however, is that legislatures do not reflexively ride to the rescue of prosecutors handed interpretive defeats in court. According to a leading study of congressional overrides of Supreme Court decisions, Congress is more likely to overturn decisions narrowing criminal laws than those giving laws expansive interpretations, but nevertheless lets stand the vast majority (80%) of narrow interpretations.<sup>167</sup> This is cause for optimism about the potential for lenity to avoid disproportionate penalties and make serious inroads on overcriminalization.

#### B. PROPORTIONALITY-BASED APPROACHES TO STATUTORY CONSTRUCTION

If, despite the obvious advantages of the rule of lenity, the courts are to remain fickle in their adherence to it, they should at least pay close attention to the potential sentencing consequences before expanding the reach of a criminal statute. This inquiry will require courts to look past the facts of the cases before them and hypothesize the range of potential applications of the statute,<sup>168</sup> paying close attention to the penal consequences of an expansive interpretation. In cases where an expansive interpretation would threaten to

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<sup>165</sup> See Stuntz, *supra* note 1, at 510, 534–35 (describing legislatures and prosecutors as "natural allies").

<sup>166</sup> Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194 (2002).

<sup>167</sup> See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 351 tbl.9 & 352 (1991).

<sup>168</sup> This hypothetical inquiry is exactly how the Supreme Court decides federal mens rea issues. See Wiley, *supra* note 136, at 1023 (explaining that courts deciding such issues start by asking "as a hypothetical matter whether morally blameless people could violate [the statute]").

visit disproportionate punishment on convicted offenders, as determined against the baseline of other criminal laws (state or federal) proscribing the same criminal act, a narrow reading is the appropriate response unless the plain meaning of the statute commands a broader interpretation.<sup>169</sup>

Proportionality considerations should also be factored into mens rea selection. The Supreme Court should repudiate the notion that avoiding conviction of morally blameless conduct is the only goal of mens rea doctrine.<sup>170</sup> A separate, equally vital goal, and a proper concern of mens rea doctrine, is to ensure that the sanctions available in the event of conviction will be proportional to the blameworthiness of convicted offenders.<sup>171</sup> Imposing punishment in excess of blameworthiness is just as offensive in principle as punishing for blameless conduct: either way, courts are imposing punishment that is not justified by the culpability of the offender and gambling with the moral credibility of the criminal law. Crimes for which Congress has prescribed severe penalties should require correspondingly high levels of mens rea so that offenders will be seriously blameworthy. Only then will convicted offenders be morally deserving of the stiff penalties that federal law affords.

### C. STATUTORY EXCLUSIVITY

The reforms previously discussed all address the common situation in which federal criminal statutes are ambiguous and thus, as a textual matter, can reasonably be read either broadly or narrowly. One additional reform is necessary to address the situation in which a number of overlapping statutes apply to the same basic crime: making specific criminal statutes addressing the same crime exclusive of more general statutes. The problem here is not that the statutes are ambiguous; it is that there are too many statutes that

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<sup>169</sup> Pleas for proportionality of punishment inevitably encounter the objection that it is impossible to determine when, objectively speaking, punishments are proportional. Though familiar, the objection is misplaced. Proportionality serves as a judicially manageable legal standard in a variety of other contexts, such as determining the excessiveness of terms of imprisonment and of punitive-damages awards, and proportionality is used, by legislatures and judges alike, in grading offenses and sentencing offenders. See Smith, *supra* note 8, at 891–92 (citing cases). Taking proportionality considerations into account in interpreting federal crimes is no more perilous than in these other contexts, especially if, as suggested here, the proportionality inquiry is grounded in a comparison with the penalties other laws provide for a particular crime and is used only as an interpretive principle (as opposed to a standard of constitutionality).

<sup>170</sup> In *Carter v. United States*, 530 U.S. 255 (2000), for example, the Court declared that mens rea doctrine “requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Id.* at 269.

<sup>171</sup> For an extensive argument along this line, see Smith, *supra* note 20.

plainly apply to same criminal act. The example given earlier was fraud,<sup>172</sup> but the point is easily generalizable: when multiple criminal laws regulate the same criminal act but provide different penalties or define the crime differently, allowing prosecutors to pick and choose among the statutes at will is necessarily to allow them to override legislative policy choices concerning crime definition and the proper penalty for a criminal act.

This problem can and should be solved by adopting a principle of statutory exclusivity to address the redundancy of the federal code. On this approach, when multiple statutes of the same type apply to the same act or omission,<sup>173</sup> prosecutors would be required to proceed under the most specific statute applicable to that act to the exclusion of more general crimes, even if that would mean that the prosecution would fail due to how Congress defined the most specific crime.<sup>174</sup> The reason for limiting prosecutors to the most specific statute is that the more specific the crime is, the more likely it is that Congress understood the range of behaviors that it was criminalizing and thus that the definition of the crime and the prescribed punishment will fit those behaviors.

To illustrate how the exclusivity approach would work, consider, for example, a prosecution involving the fraudulent use of credit cards. Although mail and wire fraud could, as a literal matter, apply, the credit-card fraud statute would be the more specific statute because it applies to a subset of frauds orchestrated through the use of the mails and wires—namely, frauds involving credit cards. Consequently, the credit-card fraud statute would be the exclusive basis for prosecuting that act. This would cut in half the maximum punishment of twenty years for mail and wire fraud.<sup>175</sup>

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<sup>172</sup> See *supra* Part II.A.2.

<sup>173</sup> The requirement that overlapping statutes be of the same type is an important limitation because it ensures that the penal comparison will be appropriate. For example, rape is both a battery (in the sense that it involves an unwanted, offensive touching) and a sexual assault. Those crimes, though capable of being committed by the same physical act, protect victim interests of differing weight (bodily integrity versus sexual autonomy), and so the penalty for battery is not an appropriate measure of what the penalty should be for rape. Similarly, in the example of a fatal beating, the fact that the beating is an assault would obviously not tell us what the punishment should be when it results in death. In both sets of crimes, the heightened punishment for the more serious crime (i.e., rape and murder, respectively) is justified by the greater seriousness of those crimes, and no rational legislature would grade those crimes at the level of battery and assault.

<sup>174</sup> The Court has adopted such exclusivity principles in other contexts. See *supra* note 101.

<sup>175</sup> Compare 15 U.S.C. § 1644 (2006) (credit-card fraud), with 18 U.S.C. §§ 1341, 1343 (2006) (mail and wire fraud, respectively). In some cases, however, exclusivity will actually require the prosecutor to use the statute carrying the higher punishment. For example, if a defendant mails in a materially false credit application to a federally insured bank, the bank



Notice that if the amount of the fraud was below the monetary threshold specified in the credit-card statute, *no* federal fraud statute could be used. This is because the prosecutor would be limited to the credit-card statute yet unable to prove a necessary element for conviction under that statute. In that event, the prosecutor would have two choices: either charge the defendant for a different criminal act or omission (assuming there is one), or leave the defendant to potential prosecution in state court. As this example demonstrates, an exclusivity approach would prevent federal prosecutors from using charge selection to evade congressional policy choices about the definition of federal crimes or to drive up the maximum punishment above the level Congress prescribed in the most specific applicable statute.<sup>176</sup>

To be sure, the exclusivity approach would represent a considerable departure from the status quo in federal criminal law. Even so, it is not without precedent; indeed, the principles motivating the exclusivity approach have *already* been endorsed by the Supreme Court under the Assimilative Crimes Act (ACA)<sup>177</sup> for crimes committed on federal enclaves. The exclusivity approach outlined here, therefore, is actually far less radical than it might otherwise seem.

In *Lewis v. United States*, the Supreme Court sought to prevent prosecutors from using the ACA to evade offense grading and other

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fraud statute would be the most specific statute as compared to mail or wire fraud. Bank fraud, however, is punishable by up to thirty years in prison versus the twenty-year maximum for mail and wire fraud. *Compare* 18 U.S.C. § 1014 (bank fraud), *with* §§ 1341, 1343 (mail and wire fraud, respectively).

<sup>176</sup> Cases may arise in which it is unclear which of two potentially applicable crimes of the same type is the more specific. When it is unclear which statute should be the exclusive remedy, it makes sense to err on the side of caution and require use of the statute carrying the lower penalty. To be sure, this tiebreaker rule resolves ambiguous cases according to a substantive bias (avoiding potentially disproportionate punishment), but that is unexceptional. For instance, the federalism clear-statement rule resolves ambiguities about the scope of federal laws against alteration of the federal-state balance, *United States v. Bass*, 404 U.S. 336, 349 (1971), statutes in derogation of the common law are presumptively read as retaining entrenched common law principles, *United States v. Texas*, 507 U.S. 529, 534 (1993), and, where possible, statutes are read to ensure their constitutionality, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001).

<sup>177</sup> 18 U.S.C. § 13 (2006). The Act, passed at a time when there was little or no federal criminal law applicable to federal enclaves, allows prosecutors to fill “gaps” in federal enclave law by “borrowing” offenses from the state in which the enclave is located and using such offenses as the basis for a federal conviction. State crimes can be borrowed when the defendant committed, on a federal enclave, “any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated.” § 13(a). The same basic approach governs under the Major Crimes Act, 18 U.S.C. § 1153 (2006), for crimes committed in Indian Country. *Id.* § 1153(b).

congressional policy determinations embodied in federal crimes.<sup>178</sup> The case involved a fatal child beating classified as second-degree murder under federal law because it was not premeditated.<sup>179</sup> The prosecutor, however, used the ACA to borrow a state statute that treated the death of a child under the age of twelve as capital murder, even if unpremeditated, if the defendant intended to kill or seriously harm the child.<sup>180</sup> The government essentially argued that, as is the case with overlapping federal criminal laws, prosecutors can pick and choose among potentially applicable criminal statutes as they see fit to take advantage of penal and other differences between the crimes.

The *Lewis* majority refused to allow the prosecutor to use the ACA essentially to rewrite the federal definition of first-degree murder and thereby obtain a penalty—death—that Congress had reserved for premeditated murders. It was “fairly obvious,” the majority thought, that resort to the ACA is improper “where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment.”<sup>181</sup> Thus, the prosecutor had to use the federal murder statute, even though its definition and grading were not advantageous in that case.

The parallels between *Lewis* and the exclusivity approach suggested above are striking. In *Lewis*, the Court was rightly troubled by the fact that prosecutors were using the ACA to get around inconvenient limitations that Congress wrote into the definition of federal crimes and to obtain higher penalties than those Congress authorized for those crimes. What the Court has inexplicably failed to realize, however, is that the *same* problems exist—except on a *much larger scale*—within the purely federal sphere. The strategic charge selection that so troubled the *Lewis* Court happens every day in federal courtrooms: prosecutors routinely exploit the enormous breadth and depth of the federal criminal code to get around limitations in the definition of particular crimes and to drive up the punishments available in any given case. In both cases, the critical point is that federal prosecutors—who are supposed to *implement* policy choices made by Congress—are instead systematically exploiting overlapping offenses to *override* those choices.

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<sup>178</sup> 523 U.S. 155 (1998).

<sup>179</sup> *Id.* at 158.

<sup>180</sup> *Id.* at 166–68 (citing statutes).

<sup>181</sup> *Id.* at 165.

## D. REINVIGORATE STATE-OF-MIND AND OTHER DEFENSES

On the subject of defenses, the place to begin is for the Supreme Court to overrule *United States v. Oakland Cannabis Buyers' Cooperative*.<sup>182</sup> The trouble here is not the result the Court reached (which was sound), but rather the majority's sweeping and highly problematic dicta questioning the propriety of federal courts enforcing nonstatutory defenses—even ones as entrenched in Anglo-American common law as necessity<sup>183</sup>—to statutory crimes. The common law recognized justification and excuse defenses precisely to avoid morally undeserved punishment for acts that would otherwise be condemned as a crime.<sup>184</sup> Were the federal courts to cease enforcing these defenses, the result would necessarily be to expose morally blameless conduct—conduct that presently is overwhelmingly, if not universally, exempt from punishment in our country<sup>185</sup>—to punishment in the federal system.

*Oakland Cannabis's* suggestion that such a radical departure from existing practice may be necessary to show proper respect for legislative supremacy in crime definition<sup>186</sup> is misplaced. It is a commonplace of statutory interpretation that Congress legislates against the background of the common law and is presumed not only to be aware of, but also to accept continued adherence to, common law rules and principles not abrogated by statute.<sup>187</sup> At a minimum, this doctrine easily encompasses continued enforcement of common law defenses to subsequently enacted criminal laws. In passing the thousands of crimes presently on the federal books, Congress presumptively knew that common law defenses exist in the federal system and, by not repudiating those defenses (and, in the case of

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<sup>182</sup> 532 U.S. 483 (2001) (holding that medical necessity is not a valid defense to the manufacture, possession, or distribution of controlled substances).

<sup>183</sup> See, e.g., *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). Necessity also includes a variety of established justification defenses, such as self-defense and law enforcement's privilege to use force in effecting arrests or to commit crimes (such as undercover "sting" operations) to catch lawbreakers in the act. None of these justification defenses exist by virtue of federal statute, and thus all are at risk under *Oakland Cannabis*.

<sup>184</sup> In the case of justification defenses, such as necessity and self-defense, the defendant's conduct is morally appropriate and thus exempted from punishment. By contrast, excuses (such as insanity, immaturity, and duress) deal with situations where punishment is withheld, not because the defendant's conduct was morally blameless, but rather because exceptional circumstances (such as severe mental disease, extreme youth, or overwhelming external pressure, respectively) make it unfair to punish the defendant despite the blameworthiness of his act.

<sup>185</sup> With the exception of the insanity defense, which has been abolished in four states, the classic justification and excuse defenses remain available in every state.

<sup>186</sup> See *Oakland Cannabis*, 532 U.S. at 490.

<sup>187</sup> See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289–90 & n.13 (2010).

the insanity defense, by expressly codifying it<sup>188</sup>) indicated its expectation and intent that those defenses would remain available in future federal prosecutions.<sup>189</sup>

Although not commonly recognized, *Oakland Cannabis* calls into serious question the source of the authority of the federal courts to impose implied (read: “judicially created”) mens rea requirements. If, as *Oakland Cannabis* suggests, longstanding congressional acquiescence in defenses as deeply rooted in the common law as necessity does not justify continued judicial enforcement of those defenses, then the common law heritage concerning implied mens rea requirements, recognized as long ago as *Morissette v. United States*,<sup>190</sup> cannot guarantee the propriety of judicially created mens rea requirements. After all, the purpose and effect of reading mens rea requirements into criminal statutes is to create, on judicial initiative alone, a defense for persons lacking the state of mind deemed essential by the courts but not specifically required by Congress as a prerequisite for punishment.

Finally, courts should substantially overhaul federal mens rea doctrine. Quite simply, the doctrine is in dire need of reform, both in its underlying theory and in its operational details. For the stated purpose of preventing punishment for morally blameless (or “innocent”) conduct, the Supreme Court has made “innocence protection” the driving force in mens rea selection.<sup>191</sup> Heightened mens rea requirements can and should be imposed

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<sup>188</sup> In response to the acquittal of President Reagan’s would-be assassin on insanity grounds, Congress enacted a statute adopting a considerably narrower formulation of the insanity defense. See Act of Oct. 12, 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 1837, 2057 (current version at 18 U.S.C. § 17 (2006)) (rejecting the Model Penal Code’s formulation, previously adopted by the federal courts, in favor of the common law’s more restrictive one).

<sup>189</sup> Indeed, the Court had recognized as much prior to *Oakland Cannabis*. See *United States v. Bailey*, 444 U.S. 394, 415–16 n.11 (1980) (noting that common law defenses to crimes remain enforceable because “Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law”). More controversially, it is possible to argue that, in legislating against the background of a common law containing nonstatutory criminal defenses, Congress not only accepted the previously created roster of defenses but also judicial power to *create* nonstatutory defenses. For an argument that *Oakland Cannabis* and, indeed, federal mens rea doctrine rest on an unduly cramped conception of the separation of powers in criminal law, see Smith, *supra* note 137, at 65–74, 84–89.

<sup>190</sup> 342 U.S. 246, 251–52 (1952).

<sup>191</sup> See, e.g., *Carter v. United States*, 530 U.S. 255, 269 (2000). See generally Smith, *supra* note 20, at 131 (“The Supreme Court has insisted that federal crimes be defined in terms that guarantee a path to acquittal for morally blameless conduct and has increasingly looked to the mental element of crimes to provide this protection against punishment for ‘innocent’ conduct.”).

where (and *only* where) a federal criminal statute would otherwise potentially reach morally blameless conduct.<sup>192</sup>

At the level of theory, the goal of mens rea doctrine is sound but unduly narrow. It makes sense to avoid punishment for morally blameless punishment; after all, as Professors Paul Robinson and John Darley have shown, the criminal justice system works better if it reaches results, such as a desert-based distribution of punishment, that the public accepts as fair and legitimate.<sup>193</sup> A system that punishes morally blameless conduct is undoubtedly unfair, but so, too, is a system that imposes punishment in excess of blameworthiness, i.e., disproportionately severe punishment for blameworthy acts. The goal of mens rea doctrine should thus not merely be to avoid punishing blameless acts but to limit punishment, for blameless and blameworthy conduct alike, in accordance with blameworthiness—and that broader goal requires ruling out all punishment for blameless acts *and* ensuring that the punishment for blameworthy acts “fits” the crime.<sup>194</sup>

In addition to making disproportionate punishment a proper concern of mens rea doctrine, courts should free the prevailing federal method of selecting mens rea levels from the shackles that prevent it from achieving its important goal of aligning punishment and blameworthiness. Once courts detect a potential innocence-protection problem—understood not just as the potential for punishment of blameless acts, but also as disproportionate punishment for blameworthy acts—the courts should impose whatever heightened mens rea requirement is necessary to limit

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<sup>192</sup> As I have explained:

Where the nature of the prohibited act, as defined by Congress, is sufficient to guarantee that anyone convicted of the crime will be morally blameworthy, courts treat the legislative definition of the crime as conclusive and do not impose heightened mens rea requirements. If, however, the prohibited act is not “inevitably nefarious” and thus could potentially reach innocent conduct, courts adopt more stringent mens rea requirements designed to exclude all innocent conduct from the crime’s reach.

Smith, *supra* note 20, at 130; *see, e.g.*, *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704–06 (2000) (ruling that, to convict for obstruction of justice on a “corrupt persuasion” theory, the government must prove that the defendant knew his or her efforts to conceal documents from federal investigators were illegal); *Staples v. United States*, 511 U.S. 600, 608–16 (1994) (holding that, because gun possession is an innocuous act in our gun-friendly culture, defendants cannot be convicted for possessing unregistered “firearms” unless they knew the characteristics of their weapons that subjected them to special federal registration requirements); *Ratzlaf v. United States*, 510 U.S. 135, 136–37 (1994) (requiring proof of knowledge of illegality to prevent punishment of innocuous efforts to structure cash transactions to avoid currency transaction reporting requirements).

<sup>193</sup> *See, e.g.*, Robinson & Darley, *supra* note 120. *See generally* Smith, *supra* note 8, at 887–88 (explaining the importance to retributivists and utilitarians alike of limiting punishment in accordance with moral blameworthiness).

<sup>194</sup> For an argument along these lines, *see* Smith, *supra* note 20.

punishment in accordance with blameworthiness.<sup>195</sup> In doing so, courts should not be at all reluctant to require prosecutors, where necessary to avoid morally undeserved punishment, to prove that the defendant knew his conduct was illegal.

This more robust mens rea doctrine could be the single most important contribution the courts could make to avoiding the qualitative problems associated with overcriminalization. The overcriminalization “horror stories” typically involve prosecutors using obscure regulatory laws as traps for unwary citizens who are understandably unaware either of the existence or meaning of the law in question.<sup>196</sup> To the extent judges in these cases start demanding proof that the defendants actually knew they were breaking the law they are charged with violating, prosecutors could no longer count on getting guilty pleas or guilty verdicts for innocuous conduct that a law-abiding person might have engaged in. The effect would be more than simply to prevent unjust punishment, although that is a worthy goal in its own right. It would also give the federal government much-needed incentives either to give the regulated public notice that such obscure crimes exist, thereby enabling law-abiding citizens to obey the law and prosecutors to prove knowing illegality by lawbreakers, or, as Professor Darryl Brown helpfully suggests,<sup>197</sup> to use administrative enforcement mechanisms, in place of criminal prosecutions, to achieve the government’s regulatory goals.

## V. CONCLUSION

As this survey of federal criminal law has shown, overcriminalization is a serious problem in the federal system and, more generally, for American criminal law. The number and scope of criminal laws, however, is only the tip of the iceberg. Ultimately, overcriminalization is so problematic because it tends to degrade the quality of criminal codes and result in unwarranted punishment, jeopardizing the quality of justice the

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<sup>195</sup> See generally *id.*

<sup>196</sup> For a collection of case studies where this has occurred, see, e.g., *Case Studies*, *supra* note 16. The website does not mince words:

[The] case studies are documented stories of good people whose lives were impacted by overcriminalization: criminal laws that are overbroad or flat-out ridiculous, prosecutors and prosecutions that are over-zealous, and sentences that are harsh, unreasonable, and unjust. The lives of some were shattered when they were arrested, prosecuted, and imprisoned for doing things no one would think are crimes. Others did an act that could be considered wrongful, but did so unintentionally—without “criminal intent” (what lawyers call *mens rea*)—and should not have been charged, convicted, or punished.

*Id.*

<sup>197</sup> See Darryl Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657, 677–83 (2011).

system generates. Where, as in the federal system, overcriminalization is the order of the day, the *actus reus* and *mens rea* elements of crimes tend to be poorly defined, and these crime-definition problems are magnified across the multiplicity of statutes applicable to the same criminal act. In such a system, the legislature is no longer supreme in matters of crime and punishment; it is ultimately prosecutors, who exploit incompletely defined crimes and the redundancy of the criminal code to expand the scope of their power and ratchet up the punishment that convicted defendants face.

Most attribute the blame for that unjust state of affairs, and for the federalization of crime more generally, to Congress, but closer inspection reveals a very different story. The courts have done quite a lot to facilitate federalization and the unmistakable drift toward greater severity in federal sanctions. They have done so by construing criminal statutes expansively, extending the reach, scope, and redundancy of federal criminal law. As if that were not bad enough, the courts have allowed prosecutors to treat the penalty prescribed in specific criminal statutes as merely an opening bid in an attempt to secure the highest possible sentence: even where a federal statute specifically applies to a particular criminal act, courts have often broadly construed more general overlapping statutes carrying higher penalties to encompass the act. To make sure the blameworthy do not get away, the courts have exposed the guilty to punishment in excess of blameworthiness and opened the floodgates to federal criminal cases, transforming every U.S. District Court into “a ‘police court’ where judges are under ‘constant pressure to keep cases moving as fast as possible.’”<sup>198</sup>

As judges decry this state of affairs and scholars hope against hope for bold legislative or constitutional solutions, they have missed something critical. Given that the federal courts helped make federal criminal law as broad and as punitive as it is, there is a ready solution to overcriminalization’s many problems short of legislative self-restraint or judicial activism in the name of the Constitution. The solution is for federal judges to approach their vital interpretive functions with keen sensitivity to the many adverse effects that overcriminalization—and the courts’ current, self-defeating interpretive strategies—create for federal criminal law. If courts cease giving unwarranted scope to ambiguous criminal laws and redouble their efforts to avoid the imposition of morally undeserved punishment, overcriminalization need not be the disaster that so many, with good cause, believe it to be.

In short, although a substantially smaller and comprehensively overhauled criminal code would be ideal, we need not await a congressional

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<sup>198</sup> Sanford H. Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1250–51 (1995) (quoting remarks by Chief Judge Judith Keep of the Southern District of California).

epiphany in order to overcome overcriminalization. All we need is for judges to quit playing the overcriminalization game in which they, no less than legislators, have proven to be far too adept. Only if that happens will judges be in a position to cry foul if overcriminalization continues unabated.



